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SIR WILLIAM JONES.

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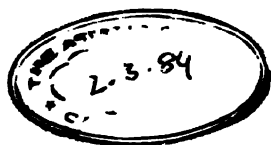
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THE
LAWS OF MENU,
SON OF BRAHMÁ,

(CONTINUED.)

CHAPTER THE NINTH.

*On Judicature; on Law, Private and Criminal;
and on the Commercial and Servile Classes.*

1. ‘ I NOW will propound the immemorial
‘ duties of man and woman, who must both
‘ remain firm in the legal path, whether united
‘ or separated.

2. ‘ Day and night must women be held by
‘ their protectors in a state of dependence; but
‘ in *lawful and innocent* recreations, though
‘ rather addicted to them, they may be left at
‘ their own disposal.

3. ‘ Their fathers protect them in childhood;
‘ their husbands protect them in youth; their
‘ sons protect them in age: a woman is never
‘ fit for independence.

4. ‘ Reprehensible is the father, who gives
 ‘ not his daughter in marriage at the proper
 ‘ time; and the husband, who approaches not
 ‘ his wife in due season; reprehensible also is
 ‘ the son, who protects not his mother after the
 ‘ death of her lord.

5. ‘ Women must, above all, be restrained
 ‘ from the smallest illicit gratification; for, not
 ‘ being thus restrained, they bring sorrow on
 ‘ both families :

6. ‘ Let husbands consider this as the supreme
 ‘ law, ordained for all classes; and let them,
 ‘ how weak soever, diligently keep their wives
 ‘ under lawful restrictions ;

7. ‘ For he, who preserves his wife *from*
 ‘ *vice*, preserves his offspring *from suspicion of*
 ‘ *bastardy*, his ancient usages *from neglect*, his
 ‘ family *from disgrace*, himself *from anguish*, and
 ‘ his duty *from violation*.

8. ‘ The husband, after conception by his
 ‘ wife, becomes himself an embryo, and is born
 ‘ a second time here below; for which reason
 ‘ the wife is called *jáyá*, since by her (*jáyaté*)
 ‘ he is born again :

9. ‘ Now the wife brings forth a son endued
 ‘ with similar qualities to those of the father ;
 ‘ so that, with a view to an excellent offspring,
 ‘ he must vigilantly guard his wife.

10. ‘ No man, indeed, can wholly restrain

‘ women by violent measures ; but, by these
‘ expedients, they may be restrained :

11. ‘ Let the husband keep his wife employ-
‘ ed in the collection and expenditure of wealth,
‘ in purification and female duty, in the pre-
‘ paration of daily food, and the superintend-
‘ ence of household utensils.

12. ‘ By confinement at home, even under
‘ affectionate and observant guardians, they are
‘ not secure ; but those women are truly secure,
‘ who are guarded by their own good inclina-
‘ tions.

13. ‘ Drinking *spirituous liquor*, associating
‘ with evil persons, absence from her husband,
‘ rambling abroad, unseasonable sleep, and
‘ dwelling in the house of another, are six
‘ faults which bring infamy on a married wo-
‘ man :

14. ‘ Such *women* examine not beauty, nor
‘ pay attention to age ; whether *their lover be*
‘ handsome or ugly, they think it is enough
‘ that he is a man, and pursue their pleasures.

15. ‘ Through their passion for men, their
‘ mutable temper, their want of settled affection,
‘ and their perverse nature (let them be guard-
‘ ed in this world ever so well) they soon be-
‘ come alienated from their husbands.

16. ‘ Yet should their husbands be diligently
‘ careful in guarding them ; though they well

‘ know the disposition, with which the lord of
 ‘ creation formed them :

17. ‘ MÈNU allotted to such women a love of
 ‘ their bed, of their seat, and of ornament, im-
 ‘ pure appetites, wrath, weak flexibility, desire
 ‘ of mischief, and bad conduct.

18. ‘ Women have no business with the
 ‘ texts of the *Vēda* ; thus is the law fully settled :
 ‘ having, therefore, no evidence *of law*, and no
 ‘ *knowledge of* expiatory texts, sinful women
 ‘ must be as foul as falsehood itself ; and this is
 ‘ a fixed rule.

19. ‘ To this effect many texts, which may
 ‘ show their true disposition, are chanted in the
 ‘ *Vēdas* : hear now their expiation for sin.

20. “ That pure blood, which my mother
 “ defiled by adulterous desire, frequenting the
 “ houses of other men, and violating her duty
 “ to her lord, that blood may my father pu-
 “ rify ! ” Such is the tenour of the holy text,
 ‘ *which her son, who knows her guilt, must pro-*
 ‘ *nounce for her ;*

21. ‘ *And* this expiation has been declared
 ‘ for every unbecoming thought, which en-
 ‘ ters her mind, concerning infidelity to her
 ‘ husband ; since that *is the beginning of* adul-
 ‘ tery.

22. ‘ Whatever be the qualities of the man,
 ‘ with whom a woman is united by lawful

‘ marriage, such qualities even she assumes;
 ‘ like a river *united* with the sea.

23. ‘ AC SHAMA LA, a woman of the lowest
 ‘ birth, being thus united to VASISHT’HA, and
 ‘ SA’RANGI’, being united to MANDAPA’LA,
 ‘ were entitled to very high honour :

24. ‘ These, and other females of low birth,
 ‘ have attained eminence in this world by the
 ‘ respective good qualities of their lords.

25. ‘ Thus has the law, ever pure, been pro-
 ‘ pounded for the civil conduct of men and
 ‘ women: hear, next, the laws concerning
 ‘ children, by obedience to which may happi-
 ‘ nefs be attained in this and the future life.

26. ‘ WHEN good women, united with hus-
 ‘ bands in expectation of progeny, eminently
 ‘ fortunate and worthy of reverence, irradiate
 ‘ the houses of their lords, between them and
 ‘ goddesses of abundance there is no diversity
 ‘ whatever.

27. ‘ The production of children, the nur-
 ‘ ture of them, when produced, and the daily
 ‘ superintendence of domestick affairs, are pe-
 ‘ culiar to the wife :

28. ‘ From the wife alone proceed offspring,
 ‘ good household management, solicitous atten-
 ‘ tion, most exquisite caresses, and that heavenly
 ‘ beatitude, which she obtains for the manes of
 ‘ ancestors, and for *the husband* himself.

29. ‘ She, who deserts not her lord, but
 ‘ keeps in subjection to him her heart, her
 ‘ speech, and her body, shall attain his mansion
 ‘ in heaven, and, by the virtuous in this world,
 ‘ be called *Sádhvī*, or *good and faithful*;

30. ‘ But a wife, by disloyalty to her hus-
 ‘ band, shall incur disgrace in this life, and be
 ‘ born *in the next* from the womb of a shakal,
 ‘ or be tormented with horrible diseases, which
 ‘ punish vice.

31. ‘ LEARN now that excellent law, univer-
 ‘ sally salutary, which was declared, concerning
 ‘ issue, by great and good sages formerly born,

32. ‘ They consider the male issue of a wo-
 ‘ man as the son of the lord; but, on the sub-
 ‘ ject of that lord, a difference of opinion is
 ‘ mentioned in the *Véda*; some giving that
 ‘ name to the real procreator of the child, and
 ‘ others applying it to the married possessor of
 ‘ the woman.

33. ‘ The woman is considered in law as the
 ‘ field, and the man as the grain: now vegeta-
 ‘ ble bodies are formed by the united operation
 ‘ of the seed and the field.

34. ‘ In some cases the prolific power of
 ‘ the male is chiefly distinguished; in others,
 ‘ the receptacle of the female; but, when both
 ‘ are equal in dignity, the offspring is most
 ‘ highly esteemed:

35. ' In general, as between the male and
' female powers of procreation, the male is held
' superiour ; since the offspring of all procreant
' beings is distinguished by marks of the male
' power.

36. ' Whatever be the quality of seed, scat-
' tered in a field prepared in due season, a plant
' of the same quality springs in that field, with
' peculiar visible properties.

37. ' Certainly this earth is called the pri-
' meval womb of many beings ; but the seed
' exhibits not in its vegetation any properties
' of the womb.

38. ' On earth here below, even in the same
' ploughed field, seeds of many different forms,
' having been sown by husbandmen in the
' proper season, vegetate according to their
' nature :

39. ' Riceplants, mature in sixty days, and
' those, which require transplantation, *mudga*,
' *tila*, *másha*, barley, leeks, and sugarcane all
' spring up according to the seeds.

40. ' That one plant should be sown, and
' another produced, cannot happen : whatever
' seed may be sown, even that produces its
' proper item.

41. ' Never must it be sown in another
' man's field by him, who has natural good
' sense, who has been well instructed, who

‘ knows the *Vēda* and its *Angas*, who desires
 ‘ long life :

42. ‘ They, who are acquainted with past
 ‘ times, have preserved, on this subject, holy
 ‘ strains chanted by every breeze, *declaring*,
 ‘ that “ seed must not be sown in the field of
 ‘ “ another man.”

43. ‘ As the arrow of that hunter is vain,
 ‘ who shoots it into the wound, which another
 ‘ had made just before in the antelope, thus
 ‘ instantly perishes the seed, which a man
 ‘ throws into the soil of another :

44. ‘ Sages, who know former times, con-
 ‘ sider this earth (*Prīṭ’bṛū*) as the wife of king
 ‘ PṚITHU ; and thus they pronounce cultivated
 ‘ land to be the property of him, who cut away
 ‘ the wood, *or who cleared and tilled it* ; and the
 ‘ antelope, of the first hunter, who mortally
 ‘ wounded it.

45. ‘ Then only is a man perfect, when he
 ‘ consists of *three persons united*, his wife, him-
 ‘ self, and his son ; and thus have learned *Brāh-*
 ‘ *mens* announced this *maxim* : “ The husband
 ‘ “ is even one person with his wife,” *for all do-*
 ‘ *mestick and religious, not for all civil, purposes.*

46. ‘ Neither by sale nor desertion can a
 ‘ wife be released from her husband : thus we
 ‘ fully acknowledge the law enacted of old by
 ‘ the lord of creatures.

47. ' Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say " I give:" these three are, by good men, done once for all *and irrevocably*.

48. ' As with cows, mares, female camels, slave girls, milch buffalos, shegoats, and ewes, it is not the owner of the *bull or other* father, who owns the offspring, even thus is it with the wives of others.

49. ' They, who have no property in the field, but, having grain in their possession, sow it in soil owned by another, can receive no advantage whatever from the corn, which may be produced:

50. ' Should a bull beget a hundred calves on cows not owned by his master, those calves belong solely to the proprietors of the cows; and the strength of the bull was wasted:

51. ' Thus men, who have no marital property in women, but sow in the fields owned by others, may raise up fruit to the husbands; but the procreator can have no advantage from it.

52. ' Unless there be a special agreement between the owners of the land and of the seed, the fruit belongs clearly to the land-

owner; for the receptacle is more important than the seed:

53. But the owners of the seed and of the soil may be considered in this world as joint owners of the crop, which they agree, by special compact in consideration of the seed, to divide between them.

54. Whatever man owns a field, if seed, conveyed into it by water or wind, should germinate, the plant belongs to the landowner: the mere sower takes not the fruit.

55. Such is the law concerning the offspring of cows, and mares, of female camels, goats, and sheep, of slave girls, hens, and milch buffalos, *unless there be a special agreement.*

56. Thus has the comparative importance of the soil and the seed been declared to you: I will next propound the law concerning women, who have no issue *by their husbands.*

57. The wife of an elder brother is considered as mother-in-law to the younger; and the wife of the younger as daughter-in-law to the elder:

58. The elder brother, amorously approaching the wife of the younger, and the younger, caressing the wife of the elder, are both degraded, even though authorized *by the*

‘ *husband or spiritual guide*, except when such
 ‘ wife has no issue.

59. ‘ On failure of issue by the husband, *if*
 ‘ *he be of the servile class*, the desired offspring
 ‘ may be procreated, either by his brother or
 ‘ some other *sapinda*, on the wife, who has been
 ‘ duly authorized:

60. ‘ Sprinkled with clarified butter, silent,
 ‘ in the night, let the kinsman thus appointed
 ‘ beget one son, but a second by no means, on
 ‘ the widow or *childless wife*:

61. ‘ Some sages, learned in the laws con-
 ‘ cerning women, thinking it possible, that the
 ‘ great object of that appointment may not be
 ‘ obtained *by the birth of a single son*, are of opi-
 ‘ nion, that the wife and appointed kinsman
 ‘ may legally procreate a second.

62. ‘ The first object of the appointment
 ‘ being obtained according to law, both *the*
 ‘ *brother and the widow* must live together like
 ‘ a father and a daughter by affinity.

63. ‘ Either brother, appointed for this pur-
 ‘ pose, who deviates from the strict rule, and
 ‘ acts from carnal desire, shall be degraded, as
 ‘ having defiled the bed of his daughter-in-law
 ‘ or of his father.

64. ‘ By men of twiceborn classes no widow,
 ‘ or *childless wife*, must be authorized to con-
 ‘ ceive by any other than her lord; for they,

‘ who authorize her to conceive by any other,
 ‘ violate the primeval law.

65. ‘ Such a commission *to a brother or other*
 ‘ *near kinsman* is nowhere mentioned in the
 nuptial texts of the *Vēda* ; nor is the marriage
 ‘ of a widow even named in the laws con-
 ‘ cerning marriage.

66. ‘ This practice, fit only for cattle, is re-
 ‘ prehended by learned *Bráhmens*; yet it is de-
 ‘ clared to have been the practice even of men,
 ‘ while V E’ N A had sovereign power :

67. ‘ He, possessing the whole earth, and
 ‘ *thence only called* the chief of sage monarchs,
 ‘ gave rise to a confusion of classes, when his
 ‘ intellect became weak through lust.

68. ‘ Since his time the virtuous disapprove
 ‘ of that man, who, through delusion of mind,
 ‘ directs a widow *to receive the caresses of another*
 ‘ for the sake of progeny.

69. ‘ The damsel, *indeed*, whose husband
 ‘ shall die after troth verbally plighted, *but*
 ‘ *before consummation*, his brother shall take in
 ‘ marriage according to this rule :

70. ‘ Having espoused her in due form of
 ‘ law, she being clad in a white robe, and pure
 ‘ in her moral conduct, let him approach her
 ‘ once in each proper season, and until issue
 ‘ *be had*

71. ‘ LET no man of sense, who has once

‘ given his daughter to a futor, give her again
 ‘ to another; for he, who gives away his
 ‘ daughter, whom he had before given, incurs
 ‘ the guilt and fine of speaking falsely in a
 ‘ cause concerning mankind.

72. ‘ EVEN though a man have married a
 ‘ young woman in legal form, yet he may aban-
 ‘ don her, if he find her blemished, afflicted
 ‘ with disease, or previously deflowered, and
 ‘ given to him with fraud :

73. ‘ If any man give a faulty damsel in
 ‘ marriage, without disclosing her blemish, the
 ‘ husband may annul that act of her illminded
 ‘ giver.

74. ‘ SHOULD a man have business abroad,
 ‘ let him assure a fit maintenance to his wife,
 ‘ and then reside *for a time* in a foreign country;
 ‘ since a wife, even though virtuous, may be
 ‘ tempted to act amiss, if she be distressed by
 ‘ want of subsistence :

75. ‘ While her husband, having settled her
 ‘ maintenance, resides abroad, let her continue
 ‘ firm in religious austerities; but, if he leave
 ‘ her no support, let her subsist by *spinning and*
 ‘ *other* blameless arts.

76. ‘ If he live abroad on account of some
 ‘ sacred duty, let her wait for him eight
 ‘ years; if on account of knowledge of fame,

‘ fix ; if on account of pleasure, three : *after*
 ‘ *those terms have expired, she must follow him.*

77. ‘ For a whole year let a husband bear
 ‘ with his wife, who treats him with aversion ;
 ‘ but, after a year, let him deprive her of hersepa-
 ‘ rate property, and cease to cohabit with her.

78. ‘ She, who neglects her lord, though ad-
 ‘ dicted to gaming, fond of spirituous liquors,
 ‘ or diseased, must be deserted for three months,
 ‘ and deprived of her ornaments and household
 ‘ furniture :

79. ‘ But she, who is averse from a mad hus-
 ‘ band, or a deadly sinner, or an eunuch, or one
 ‘ without manly strength, or one afflicted with
 ‘ such maladies as punish crimes, must neither
 ‘ be deserted nor stripped of her property.

80. ‘ A WIFE, who drinks any spirituous
 ‘ liquors, who acts immorally, who shows
 ‘ hatred *to her lord*, who is *incurably* diseased,
 ‘ who is mischievous, who wastes his property,
 ‘ may at all times be superseded by another
 ‘ wife.

81. ‘ A barren wife may be superseded by
 ‘ another in the eighth year : she, whose chil-
 ‘ dren are all dead, in the tenth ; she, who
 ‘ brings forth *only* daughters, in the eleventh ;
 ‘ she, who speaks unkindly, without delay ;

82. ‘ But she, who, though afflicted with

‘ illness, is beloved and virtuous, must never be
 ‘ disgraced, though she may be superseded by
 ‘ another wife with her own consent.

83. ‘ If a wife, legally superseded, shall de-
 ‘ part in wrath from the house, she must either
 ‘ instantly be confined, or abandoned in the
 ‘ presence of the whole family :

84. ‘ But she, who, having been forbidden,
 ‘ addicts herself to intoxicating liquor even at
 ‘ jubilees, or mixes in crowds at theatres, must
 ‘ be fined six *raśticās* of gold.

85. ‘ WHEN twiceborn men take wives, both
 ‘ of their own class and others, the precedence,
 ‘ honour, and habitation of those wives, must
 ‘ be settled according to the order of their
 ‘ classes :

86. ‘ To all such married men, the wives of
 ‘ the same class only (not wives of a different
 ‘ class by any means) must perform the duty
 ‘ of personal attendance, and the daily business
 ‘ relating to acts of religion ;

87. ‘ For he, who foolishly causes those
 ‘ duties to be performed by any other than his
 ‘ wife of the same class, when she is near at
 ‘ hand, has been immemorially considered as a
 ‘ mere *Chandāla* begotten on a *Brāhman*.

88. ‘ To an excellent and handsome youth
 ‘ of the same class, let every man give his
 ‘ daughter in marriage, according to law ; even

‘ though she have not attained her age of *eight*
‘ *years* :

89. ‘ *But* it is better, that the damsel,
‘ though marriageable, should stay at home till
‘ her death, than that he should ever give her
‘ in marriage to a bridegroom void of excellent
‘ qualities.

90. ‘ Three years let a damsel wait, though
‘ she be marriageable; but, after that term, let
‘ her chuse for herself a bridegroom of equal
‘ rank :

91. ‘ If, not being given in marriage, she
‘ chuse her bridegroom, neither she, nor the
‘ youth chosen, commits any offence ;

92. ‘ But a damsel, thus electing her hus-
‘ band, shall not carry with her the ornaments,
‘ which she received from her father, nor those
‘ given by her mother or brethren: if she carry
‘ them away, she commits theft.

93. ‘ He, who takes to wife a damsel of full
‘ age, shall not give a nuptial present to her
‘ father; since the father lost his dominion
‘ over her, by detaining her at a time, when
‘ she might have been a parent.

94. ‘ A man, aged thirty years, may marry
‘ a girl of twelve, *if he find one* dear to his
‘ heart; or a man of twenty-four years, a
‘ damsel of eight: but, if *he finish his studentship*
‘ *earlier, and the duties of his next order* would

‘ otherwise be impeded, let him marry immediately.

95. ‘ A wife, given by the gods, *who are named in the bridal texts*, let the husband receive and support constantly, if she be virtuous, though he married her not from inclination: such conduct will please the gods.

96. ‘ To be mothers were women created; and to be fathers, men; religious rites, therefore, are ordained in the *Vēda* to be performed *by the husband* together with the wife.

97. ‘ If a nuptial gratuity has actually been given to a damsel, and he, who gave it, should die *before marriage*, the damsel shall be married to his brother, if she consent;

98. ‘ But even a man of the servile class ought not to receive a gratuity, when he gives his daughter in marriage; since a father, who takes a fee *on that occasion*, tacitly sells his daughter.

99. ‘ Neither ancients nor moderns, who were good men, have ever given a damsel in marriage, after she had been promised to another man

100. ‘ Nor, even in former creations, have we heard *the virtuous approve* the tacit sale of a daughter for a price, under the name of a nuptial gratuity.

101. “Let mutual fidelity continue till death:”



‘ this, in few words, may be considered as the
 ‘ supreme law between husband and wife.

102. ‘ Let a man and woman, united by
 ‘ marriage, constantly beware, lest, at any
 ‘ time disunited, they violate their mutual
 ‘ fidelity.

103. ‘ Thus has been declared to you the
 ‘ law, abounding in the purest affection, for
 ‘ the conduct of man and wife ; together with
 ‘ the practice of raising up offspring *to a husband*
 ‘ *of the servile class* on failure of issue by him be-
 ‘ gotten: learn now the law of inheritance.

104. ‘ After the death of the father and the
 ‘ mother, the brothers, being assembled, may
 ‘ divide among themselves the paternal *and*
 ‘ *maternal* estate ; but they have no power over
 ‘ it, while their parents live, *unless the father*
 ‘ *choose to distribute it.*

105. ‘ The eldest brother may take entire
 ‘ possession of the patrimony ; and the others
 ‘ may live under him, as *they lived* under their
 ‘ father, *unless they choose to be separated.*

106. ‘ By the eldest, at the moment of his
 ‘ birth, the father, having begotten a son, dis-
 ‘ charges his debt to his own progenitors ; the
 ‘ eldest son, therefore, ought *before partition* to
 ‘ manage the whole patrimony :

107. ‘ That son alone, by whose birth he
 ‘ discharges his debt, and through whom he

‘ attains immortality, was begotten from a
 ‘ sense of duty : all the rest are considered by
 ‘ the wise as begotten from love of pleasure.

108. ‘ Let the father alone support his sons;
 ‘ and the first born, his younger brothers ; and
 ‘ let them behave to the eldest, according to
 ‘ law, as children *should behave* to their father.

109. ‘ The first born, *if virtuous*, exalts the
 ‘ family, or, *if vitious*, destroys it : the first born
 ‘ is in this world the most respectable ; and the
 ‘ good never treat him with disdain.

110. ‘ If an elder brother act, as an elder
 ‘ brother ought, he is *to be revered* as a mother,
 ‘ as a father ; and, even if he have not the be-
 ‘ haviour of a good elder brother, he should be
 ‘ respected as a *maternal uncle, or other kins-*
 ‘ man.

111. ‘ Either let them thus live together,
 ‘ or, if they desire *separately to perform* religious
 ‘ rites, let them live apart ; since religious du-
 ‘ ties are multiplied in separate houses, their
 ‘ separation is, therefore, legal *and even laud-*
 ‘ *able*.

112. ‘ The portion deducted for the eldest is
 ‘ a twentieth part *of the heritage*, with the best
 ‘ of all the chattels ; for the middlemost, half
 ‘ of that, *or a fortieth* ; for the youngest, a
 ‘ quarter of it, *or an eightieth*.

113. ‘ The eldest and youngest respectively

‘ take their just mentioned portions; and, if
 ‘ there be more than one between them, each
 ‘ of the intermediate sons has the mean portion,
 ‘ *or the fortieth.*

114. ‘ Of all the goods collected, let the first
 ‘ born, *if he be transcendantly learned and vir-*
 ‘ *tuous*, take the best article, whatever is most
 ‘ excellent in its kind, and the best of ten cows
 ‘ *or the like:*

115. ‘ But, among brothers equally skilled in
 ‘ performing their several duties, there is no
 ‘ deduction of the best in ten, *or the most excel-*
 ‘ *lent chattel*; though some trifle, as a mark of
 ‘ greater veneration, should be given to the first
 ‘ born.

116. ‘ If a deduction be thus made, let equal
 ‘ shares of the residue be ascertained *and re-*
 ‘ *ceived*; but, if there be no deduction, the
 ‘ shares must be distributed in this manner:

117. ‘ Let the eldest have a double share,
 ‘ and the next born, a share and a half, *if they*
 ‘ *clearly surpass the rest in virtue and learning*;
 ‘ the younger sons must have each a share: *if*
 ‘ *all be equal in good qualities, they must all take*
 ‘ *share and share alike.*

118. ‘ To the *unmarried* daughters *by the*
 ‘ *same mother*, let their brothers give portions
 ‘ out of their own allotments respectively, *ac-*
 ‘ *cording to the classes of their several mothers:*

‘ let each give a fourth part of his own distinct
 ‘ share; and they, who refuse to give it, shall
 ‘ be degraded.

119. ‘ Let them never divide *the value of a*
 ‘ single goat or sheep, or a single beast with
 ‘ uncloven hoofs: a single goat or sheep *re-*
 ‘ *maining after an equal distribution* belongs to
 ‘ the first born.

120. ‘ Should a younger brother *in the man-*
 ‘ *ner before mentioned* have begotten a son on the
 ‘ wife of his *deceased* elder brother, the division
 ‘ must then be made equally *between that son,*
 ‘ *who represents the deceased, and his natural fa-*
 ‘ *ther*: thus is the law settled.

121. ‘ The representative is not *so far* wholly
 ‘ substituted by law in the place of the *deceased*
 ‘ principal, *as to have the portion of an elder son;*
 ‘ and the principal became a father in conse-
 ‘ quence of the procreation *by his younger bro-*
 ‘ *ther*; the son, therefore, is entitled by law to
 ‘ an equal share, *but not to a double portion.*

122. ‘ A younger son being born of a first
 ‘ married wife, after an elder son had been
 ‘ born of a wife last married, *but of a lower*
 ‘ *class*, it may be a doubt in that case, how the
 ‘ division shall be made:

123. ‘ Let the son, born of the elder wife,
 ‘ take one most excellent bull deducted from
 ‘ the inheritance: the next excellent bulls are.

‘ for those, who *were born first, but* are inferior
 ‘ on account of their mothers, *who were married*
 ‘ *last.*

124. ‘ A son, indeed, who was first born,
 ‘ and brought forth by the wife first married,
 ‘ may take, *if learned and virtuous*, one bull and
 ‘ fifteen cows; and the other sons may then
 ‘ take, each in right of his several mother;
 ‘ such is the fixed rule.

125. ‘ As between sons, born of wives equal
 ‘ in their class *and* without *any other* distinction,
 ‘ there can be no seniority in right of the mo-
 ‘ ther; but the seniority ordained by law, is
 ‘ according to the birth.

126. ‘ The right of invoking INDRA by the
 ‘ texts, called *śvabrābmnyá*, depends on actual
 ‘ priority of birth; and of twins also, *if any such*
 ‘ *be conceived* among *different* wives, the eldest
 ‘ is he, who was first actually born.

127. ‘ He, who has no son, may appoint his
 ‘ daughter in this manner to raise up a son for
 ‘ him, *saying*: “ the male child, who shall be
 ‘ born from her in wedlock, shall be mine, for
 ‘ the purpose of performing my obsequies.”

128. ‘ In this manner DACSHA himself, lord
 ‘ of created beings, anciently appointed all his
 ‘ *fifty* daughters to raise up sons to him, for the
 ‘ sake of multiplying his race:

129. ‘ He gave ten to DHERMA, thirteen to

‘ CASYAPA, twenty-seven to SÓMA, king of
 ‘ *Bráhmens and medical plants*, after doing ho-
 ‘ nour to them with an affectionate heart.

130. ‘ THE son of a man is even as himself;
 ‘ and as the son, such is the daughter *thus ap-*
 ‘ *pointed*: how then, *if he have no son*, can any
 ‘ inherit his property, but a daughter, who is
 ‘ closely united with his own soul?

131. ‘ Property, given to the mother on
 ‘ her marriage, is inherited by her *unmarried*
 ‘ daughter; and the son of a daughter, *appoint-*
 ‘ *ed in the manner just mentioned*, shall inherit
 ‘ the whole estate of her father, who leaves no
 ‘ son *by himself begotten*:

132. ‘ The son, however, of *such* a daughter,
 ‘ who succeeds to all the wealth of her father
 ‘ dying without a son, must offer two funeral
 ‘ cakes, one to his own father, and one to the
 ‘ father of his mother.

133. ‘ Between a son’s son and the son of
 ‘ *such* a daughter, there is no difference in law;
 ‘ since their father and mother both sprang
 ‘ from the body of the same man :

134. ‘ But, a daughter having been appoint-
 ‘ ed to produce a son for her father, and a son,
 ‘ *begotten by himself*, being afterwards born, the
 ‘ division of the heritage must in that case be
 ‘ equal; since there is no right of primogeni-
 ‘ ture for a woman.

135. ' Should a daughter, thus appointed to
 ' raise up a son for her father, die by any ac-
 ' cident without a son, the husband of that
 ' daughter may, without hesitation, possess him-
 ' self of her property.

136. ' By that male child, whom a daughter
 ' thus appointed, either by an implied intention
 ' or a plain declaration, shall produce from an
 ' husband of an equal class, the maternal grand-
 ' father becomes in law the father of a son :
 ' let that son give the funeral cake and possess
 ' the inheritance.

137. ' By a son, a man obtains victory over
 ' all people ; by a son's son, he enjoys immor-
 ' tality; and, afterwards, by the son of that
 ' grandson, he reaches the solar abode.

138. ' Since the son (*tráyaté*) delivers his
 ' father from the hell named *put*, he was,
 ' therefore, called *puttra* by BRAHMA' himself:

139. ' Now between the sons of his son and
 ' of his daughter *thus appointed*, there subsists in
 ' this world no difference ; for even the son of
 ' *such* a daughter delivers him in the next, like
 ' the son of his son.

140. ' Let the son of such a daughter offer
 ' the first funeral cake to his mother ; the se-
 ' cond to her father ; the third, to her paternal
 ' grandfather.

141. ' On the man, to whom a son has been

‘ given, *according to a subsequent law*, adorned
 ‘ with every virtue, that son shall take *a fifth*
 ‘ *or sixth part* of the heritage, though brought
 ‘ from a different family.

142. ‘ A given son must never claim the
 ‘ family and estate of his natural father: the
 ‘ funeral cake follows the family and estate;
 ‘ but of him, who has given away his son, the
 ‘ funeral oblation is extinct.

143. ‘ THE son of a wife, not authorized to
 ‘ have issue by another, and the son begotten,
 ‘ by the brother of the husband, on a wife, who
 ‘ has a son then living, are both unworthy of
 ‘ the heritage; one being the child of an adul-
 ‘ terer, and the other produced through mere
 ‘ lust.

144. ‘ Even the son of a wife duly authorized,
 ‘ not begotten according to the law *already pro-*
 ‘ *pounded*, is unworthy of the paternal estate;
 ‘ for he was procreated by an outcast:

145. ‘ But the son *legally* begotten on a wife,
 ‘ authorized for the purpose *before mentioned*,
 ‘ may inherit *in all respects*, if he be *virtuous and*
 ‘ *learned*, as a son begotten by the husband;
 ‘ since *in that case* the seed and the produce be-
 ‘ long of right to the owner of the field.

146. ‘ He, who keeps a *fixed and moveable*
 ‘ estate of his *deceased* brother, maintains the
 ‘ widow, and raises up a son to that brother,

‘ must give to that son, *at the age of fifteen*, the
 ‘ whole of his brother’s *divided* property.

147. ‘ Should a wife, even though legally
 ‘ authorized, produce a son by the brother, or
 ‘ any other *sapinda*, of her husband, that son, if
 ‘ begotten with *amorous embraces, and tokens of*
 ‘ impure desire, the sages proclaim baseborn
 ‘ and incapable of inheriting.

148. ‘ THIS law, *which has preceded*, must be
 ‘ understood of a distribution among sons be-
 ‘ gotten on women of the same class: hear now
 ‘ the law concerning *sons by* several women of
 ‘ different classes.

149. ‘ If there be four wives of a *Brábmén*
 ‘ in the direct order of the classes, and sons are
 ‘ produced by them all, this is the rule of par-
 ‘ tition *among them* :

150. ‘ The chief servant in husbandry, the
 ‘ bull kept for impregnating cows, the riding
 ‘ horse or carriage, the *ring and other* ornaments,
 ‘ and the principal messuage, shall be deducted
 ‘ from the inheritance and given to the *Bráb-*
 ‘ *men* son, together with a larger share by way
 ‘ of preeminence.

151. ‘ Let the *Brábmén* take three shares of
 ‘ the residue; the son of the *Cshatriyá* wife,
 ‘ two shares; the son of the *Vaisiyá* wife, a share
 ‘ and a half; and the son of the *Súdra* wife,
 ‘ may take one share.

بَحْيَةُ الْبَاجِثِ عَنْ جَمَلِ الْمَوَارِثِ
نُظْمُ الشَّيْخِ الْإِمَامِ الْعَالِمِ سُوقِ الدِّينِ
لِإِمْدَادِ اللَّهِ مُهْرًا عَلَى الْحَبِيبِ الرَّجَبِيِّ الْعَوَفِ
بَابِ الْمُتَقَنَّةِ رَحِمَهُ اللَّهُ تَعَالَى

*This & Plates 42, 34, 5, 6, 7, 8, 9, 10, 11. to follow each
other in Vol 6. page 26*

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ وَبِهِ نُسْتَعِينُ
 أَوَّلُ مَا تَشْفَعُ الْمَقَالَةُ بِحَمْدِ رَبِّهَا تَعَالَى
 فَالْحَمْدُ لِلَّهِ عَلَى مَا أَلْفَعَا خُدَّاهُ بِحَمْدِهِ تَجَلَّوْا غَيْرَ الْغَيْبِ الْغَمَّ
 ثُمَّ الصَّلَاةُ بِقَدْرِ السَّلَامِ عَلَى نَبِيِّ دِينِهِ الْإِسْلَامِ
 بِحَمْدِ خَاتَمِ رُسُلِ رَبِّهِ وَاللهِ مِنْ بَعْدِهِ وَصَحْبِهِ
 وَنَسَلِ اللَّهِ لَنَا الْإِعْلَاءَ فِيمَا تَوْجَّهْنَا مِنْ الْإِبْرَاءِ
 عَنْ مَذْهَبِ الْإِمَامِ زَيْدِ الْقُرْصِيِّ إِذْ كَانَ ذَلِكَ مِنْ أَهْلِ الْغُرَّةِ
 عَلِمَ بَارِ الْعِلْمِ أَوْفَا مَا سَمِعْتُ فِيهِ وَأَوَّلَ مَا لَهُ الْعَبْدُ دَعَى
 وَإِنْ هَذَا الْعِلْمُ مُخْصَصٌ بِمَا قَدْ شَاعَ فِيهِ عِنْدَ كُلِّ الْعُلَمَاءِ
 وَإِنْ زَيْدٌ أَخْصَلَ لَفَحَالَةَ بِمَا جَبَاهُ صَاحِبُ الرِّسَالَةِ
 مِنْ قَوْلِهِ فِي فَضْلِهِ مُنْتَبَهًا أَفْرَضَكُمْ زَيْدٌ وَنَاصِيكًا
 فَكَانَ أَوَّلَى بِاتِّسَاعِ التَّابِعِ لَا سَمِيًّا وَقَدْ جَاهُ الشَّافِعِي
 فَعَاكَ فِيهِ الْقَوْلُ بِالْإِتِّعَادِ مِنْ أَمْرِ وَصَمِيهِ الْإِلْفَارِ
 أَشْبَابُ مِيرَاثِ الرِّوَاثِ ثَلَاثَةٌ كُلٌّ يُعِيدُ رَأْيَهُ الْبُورَانِ
 وَفِي نَحْلٍ دَوْلَا وَلَسْتُ مَابَعْدَهُنَّ لِلْمَوَارِيثِ مَبْدُ

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وَمَنْعُ الشَّخْصِ مِنَ الْمِيرَاثِ وَاحِدَةٌ مِنْ عِلَلِ تِلَاثٍ
رَوَوْهُ قَتْلًا وَاخْتِلَافَ دِينٍ فَاقْتَصَدَ فَلْيَنْقِرِ الشَّكَّ كَالْبَقِيَّةِ
وَالْوَارِثُونَ ٢ الدَّجَالُ عَشْرَةٌ أَسْمَاءُ وَلَهُمْ مَعْرُوفَةٌ مَشْهُورَةٌ
الْإِبْنُ وَالْبَنُ الْإِبْنُ مَتَّهَانٌ تَزَلُّ وَالْأَبُ وَالْحَدْلَةُ وَارْعِلَا
وَالْأَخُ مِرَاثِي الْجِهَاتِ كَمَا قَدْ أَثَرَلَهُ اللَّهُ بِهِ الْقَرَابَاتُ
وَالْبَنُ الْأَخُ الْمُؤَدَّى إِلَيْهِ بِالْأَبِ فَاشْتَعَلَ مَقَالًا لِلْبَنِ بِالْمَكْرِبِ
وَالْعَمُّ وَالْبَنُ الْعَمُّ مِرَاثِيهِ فَاسْتَكْرَلَهُ الْأَعْيَارُ وَالنَّسَبُ
وَالدَّوْخُ وَالْمُعْتَبَرُ وَالْوَلَاةُ جُمْلَةُ الذُّكُورِ هُوَ لَا
وَالْوَارِثَاتُ كُلُّهُنَّ سَبْعٌ لَمْ يُعْطِ اثْنِي عَشَرَ هُنَّ الشَّرْعُ
بَنَتْ وَبَنَتْ ابْنًا مَرْمُوقَةً وَجَدَتْ وَرَوْحَةً وَمُعَقَّةً
وَالْأَخْتُ مِرَاثِي الْجِهَاتِ كَانَتْ فَهِيَ عَدَّةٌ قَدْ بَانَ
وَأَعْلَمُ بَانَ الْأَرْثُ نَوْعَانِ هُمَا قَرْضٌ وَتَعْصِبَةٌ عَلَى أَنْفُسِهِمَا
فَالْقَرْضُ ٢ نَصْرُ الْكِتَابِ سِتَّةٌ لَا يُضْرَ ١ الْأَرْثُ سِتُّوَاهَا ثَلَاثَةٌ
نِصْفٌ وَرُبْعٌ ثُمَّ نِصْفُ الرُّبْعِ وَالثَّلَاثُ وَالْإِسْدَنْ نِصْرُ الشَّرْعِ
وَالثَّلَاثَانِ هُمَا التَّمَامُ خَافِظٌ وَكُلٌّ خَافِظٌ إِمَامٌ

فَاِنْصَفْ فَرَضَ خَمْسَةِ اقْدَادِ الرُّوحِ وَالْاُنْثَى مِنَ الْاَوْلَادِ
 وَبَنَاتِ الْاَبْنِ عِنْدَ قَدْرِ بَنَاتِ الْاَخْتِ فِي قَدْرِ هَبْ كُلُّ مُقْتَنِي
 وَبَعْدَ هَذَا الْاَخْتِ الَّتِي مِنَ الْاَبِ عِنْدَ اَبْنِهَا هَبْ مِنْ مَقْصَبِ
 وَالرُّغْ فَرَضَ الرُّوحِ اَرْكَانَ مَعَهُ مَوْلِدُ الزَّوْجَةِ مَنْ قَدْ مَنَعَهُ
 وَهُوَ كُلُّ رُوحَةٍ اَوْ اَكْثَرًا مَعَ عَدَمِ الْاَوْلَادِ فِيهَا قَدَرًا
 وَالثَّمَرُ لِلزَّوْجَةِ وَالزَّوْجَاتِ مَعَ الْبَنِينَ وَمَعَ الْبَنَاتِ
 اَوْ مَعَ اَوْلَادِ الْبَنِينَ فَاَعْلَمِي وَابْنِي لَا تَقَارِ الدُّرُوسُ وَالْاَسْلَمِي
 وَالتَّلْثَارِ لِلْبَنَاتِ جَمْعًا مَا زَادَ عَنْ وَاحِدَةٍ فَتَسْمَعُ
 وَهُوَ كَذَلِكَ لِبَنَاتِ الْاَبْنِ فَاهْمُ مَقَالِي هُمْ صَاغِرُ الدَّهْرِ
 وَهُوَ لَا خَيْرَ فَمَا يَزِيدُ قَضَى بِهِ الْاَحْرَارُ وَالْجَبِيدُ
 لَعْدًا اِذَا كُنَّ الْاُمُورُ اَوْ اَبَايَ فَاَعْمَلْ لَعْدًا تَصِيبُ
 وَابْنُكَ فَرَضَ اَلْمَرْحُومَةِ لَا وَلَدًا مِنْ الْاَجْنَاسِ جَمْعٍ وَعَدَهُ
 كَالْبَنِي وَبَنَاتِ اَوْ بِلَا اَبٍ حُكْمُ الذَّكَوَةِ فِيهِ كَالْاَنَابِ
 وَاِنْ تَكَرَّرَ زَوْجٌ وَاِمْرَأَةٌ قُلْتُ الْبَاقِي لَهَا مَرَّتَيْنِ
 وَهَكَذَا مَعَ زَوْجَةٍ نَصَا عِدَا فَاَنْتَرُ مِنَ الْعُلُومِ قَاعِدًا

وَالثَّلَاثُ لِلْأَثَرِ إِذْ تُنْتَسَبُ مِنْ وَلَدِ الْأُمِّ بَعْدَ بَيْنَيْنِ
وَهَكَذَا إِنْ كُنَّا أَفْرَادًا وَافْتِخَارًا لِحُصْنِهَا فِيهَا سَوَاءٌ زَلٌّ
وَتُسْتَوَى الْأَنَاتُ وَالذَّكَوُ فِيهِ كَمَا قَدْ أَوْضَحَ الْمُسْطَوِي
وَالسُّدُورُ فَرْضُ سَبْعَةٍ مِنَ الْعَدْلِ أَنْ دَامَتْ بِنْتُ الْوَجْدِ
وَالْأُخْتُ بِنْتُ الْإِبِّ ثُمَّ الْجَدَّةُ وَوَلَدُ الْأُمِّ ثُمَّ الْعَدَّةُ
وَالْأَبُ يَتَحَقَّقُ مَعَ الْوَلَدِ وَهَكَذَا الْأُمُّ بِبَنَاتِهَا الصَّمَدِ
وَهُوَ لَهَا ابْنًا مَعَ الْإِثْنَيْنِ مِنْ أَخَوَاتِهَا الْمَيِّتِ فَقَسَمَ هَذَيْنِ
وَالْجَدَّةُ مِثْلُ الْإِبِّ عِنْدَ فَقْدِهِ فِي حَرْفٍ مَا يُصِيبُهُ وَمِنْهُ
إِلَّا إِذَا كَانَ هُنَاكَ أَخُو لِكُونِهِمْ فِي الْقَرَبِ وَهُوَ اسْمُهُ
وَحُكْمُهُ وَحُكْمُهُ سَيَأْتِي مُكْمَلُ الْبَيَانِ فِي الْخَالَاتِ
وَبِنْتُ الْإِبِّ تَأْخُذُ السُّدُورَ إِذَا كَانَتْ مَعَ الْبِنْتِ مِثْلًا لِحُكْمِ
وَهَكَذَا الْأُخْتُ مَعَ الْأَخِ الَّتِي بِالْأَبَوَيْنِ بِالْأُخْتِ أَذَلَّتْ
فَإِنْ لَسَادَ نِسْبُ الْجَدَّاتِ وَكَانَ كُلُّهُنَّ وَارِثَاتٍ
فَالسُّدُورُ لِيَهْرُ بِالسُّوَرِ فِي الْقِسْمَةِ الْعَادِلَةِ الشَّعْبَةِ
كُلُّ أَمْرٍ أَذَلَّتْ بِغَيْرِ وَارِثٍ فَمَا لَهَا حَظٌّ مِنَ الْمَوَارِثِ

وَنَسْقُطُ الْبُعْدَ فِي بَنَاتِ الْقُرْبَى الْمَذْهَبِ لِأَوَّلَى فَقُلْ أَحَبُّ
وَقَدْ تَنَاهَتْ قِسْمَةُ الْفُرُوضِ بِغَيْرِ شَكَالٍ وَلَا عَمَلٍ مُؤَخَّرٍ
وَيُحَرِّمُ أَنْ تُشْرَعَ فِي التَّقْصِيلِ بِكُلِّ قَوْلٍ هُوَ جَزْءٌ مُصِيبٌ
فَوَكُلُّ مَنْ أَحَدٌ زَكَلَ الْمَالُ مِنَ الْقَرَابَاتِ أَوْ الْمَوَالِي
أَوْ كَانَ مَا يُفَضَّلُ بَعْدَ الْفَرْصَةِ هُوَ أَجْوَدُ الْفُضُولَةِ الْمُفَضَّلَةِ
كَالْأَبِ وَالْجَدِّ وَجَدِّ الْجَدِّ وَالْإِبْنِ عِنْدَ قُرْبِهِ وَالْبَقْدِ
وَالْأَخِ وَالْإِخْوَانِ وَالْأَعْمَامِ وَالسَّبَبِ الْمُعْتَوَى إِلَى الْإِنْعَامِ
وَهَكَذَا يُتَوَصَّلُ جَمِيعًا وَكَانَ لِمَا أَذْكَرَ سَمِعَ
وَمَا لَمْ يَلِ الْبُعْدُ مَعَ الْقُرْبَى إِلَّا أَنْتَ مِنْ حَقِّهِ وَلَا تَصِيبُ
وَالْأَخِ وَالْأَعْمَامِ وَابْنِ أَوَّلَى مِنَ الْمَنْدَلِ لِنَسْطِ النَّسَبِ
وَالْإِبْنِ وَالْأَخِ مَعَ الْإِنَاثِ يُعْضَبُ هُنَّ فِي الْمِيرَاثِ
وَلَيْسَ فِي النِّسَاءِ طَرَفٌ أَعْصِيَهُ إِلَّا الَّتِي مَنَّتْ بِعَيْنِ الرَّقَبَةِ
وَالْأَخَوَاتِ أَنْ يَكُنَّ نَوَاتٍ هُنَّ بَعْدَ هُنَّ عَصَبَاتُ
وَالْجَدُّ مُحَرَّبٌ عَنْ الْمِيرَاثِ بِالْأَبِ فِي إِخْوَالِهِ الْقَلَابِثِ
وَهَكَذَا يَنْبَغِي الْإِبْنُ بِالْأَبِ فَلَا يُبْعَثُ عَنْ الْحَمِّ الصَّحِيحِ مَقْدَرًا لَا

وَتُسْقَطُ الْجَدَّاتُ مِنْ كُلِّ مَرْءٍ بِالْأُمِّ فَاحْفَظْهُ وَقَسْرُ الشَّيْءِ
وَتُسْقَطُ الْأُخُوَّةُ بِالْبَيْنَاتِ وَالْأَبِ الْأَدْنَى كَمَا رُوِيَ
أَوْ بَنَى التَّبِينِ حَيْثُ كَانُوا يَتَّيْنَانِ فِيهِ الْجَمْعُ وَالْوَحْدَانُ
وَنَفْعُ الْبَنَاتِ بِالْإِسْقَاطِ بِالْحَدِّ فَاحْفَظْهُ عَلَى احْتِطَاطِ
وَالْبَنَاتِ وَبَنَاتِ الْأَبِ فَلَنْ يَحْفَظَ الْعِلْمُ حَيْثُ امْتَعَى
ثُمَّ بَنَاتُ الْأَبِ يَسْقُطُ مِنْ حَارِ الْبَنَاتِ الثَّلَاثِينَ بَنَاتِي
إِلَّا إِذَا عَصَبَتْهُنَّ الذَّكَرُ مِنْ وَلَدِ الْأَبِ عَلَى مَا ذَكَرُوا
وَيَعْدُ مِنْ الْأَخَوَاتِ اللَّاتِي يَدْلِيْنَ بِالْقُرْبِ مِنَ الْجِهَاتِ
إِذَا اخْتَزَنَ مَهْرُهَا فِيهَا اسْقَطُوا وَلَدَ الْأَبِ الْبَوَاكِبِ
وَأَنْ تَكُنْ أَحَدُ لَهَا حَاضِرًا عَصَبَتْهُنَّ بِأَطْنِ وَأُظَاهِرًا
وَلَيْسَ ابْنُ الْأَجِّ بِالْمُعْصَبِ مِنْ مِثْلِهِ أَوْ قَوْفُهُ فِي النَّسَبِ
وَأَنْ يَحْذَرُوا مَا وَارِثًا وَأَخُوهُ لِلْأُمِّ حَارٌّ وَالثَّلَاثُ
وَأَخُوهُ أَيْضًا لِلْأُمِّ وَأَبِ وَاسْتَعْرِقَ الْمَالُ بِفَرْضِ النَّصَبِ
فَلْيَجْعَلْهُمُ كُلَّهُمْ لِأُمِّ وَأَخِيْبِ أَبَائِهِمْ حَتَّى فِي الْيَوْمِ
وَأَقْسَمُ عَلَى الْأَخُوَّةِ ثَلَاثَ التَّرِكَةِ وَهَذِهِ الْمَسْئَلَةُ الْمُسْتَرْكَهُ

وَالْآنَ نَبْدُ بِاللَّهِ ارْدْنَا فِي الْحَدِّ وَالْآخِرَةِ اِذْ وَعَدْنَا
 قَالُوا غَوْمًا اَقُولُ الْمُسْمَعَا وَاحْتَمَجُوا شَيْءَ الْكَلَامَاتِ اَحْمَقًا
 وَاعْلَمَ بَارِئًا الْحَدِّ ذُو اَحْوَالِ اُنْبِيكَ عَنْهُمْ عَلَى التَّوَالِي
 مُعَاسِمِ الْآخِرَةِ فِيهِمْ اِذَا لَمْ يَعْزِدِ الْقِسْمُ عَلَيْهِ بِالْأَدْنَى
 فَنَارَةٌ يَأْخُذُ ثَلَاثًا كَامِلًا اِرْكَانًا بِالْقِسْمَةِ عَنْهُ نَارًا لَا
 اِلَّامَ يَكُنْ فِيهِمْ ذُو وَسْطِهِمْ نَاقِصٌ بِاِضْطِحَ عَنْ اِسْتِقْطِهَا
 وَتَارَةً يَأْخُذُ ثَلَاثًا الْبَاقِي لَعْدِ ذُو الْقُصْرِ وَالْأَزْوَاقِ
 هَذَا لِقَامًا اِضْطَحَّتْ الْمَقَاسِمَةُ تَنْقُصُهُ عَنْ ذَاكَ بِالْمِزَاجِ
 وَتَارَةً يَأْخُذُ ثَلَاثًا لَمْ يَلِشْ عَنْهُ نَارًا لِحَالِ
 وَقَوْمُ الْإِنَاثِ عِنْدَ الْقِسْمِ مِثْلُ أَخٍ فِي شَهْمِهِ وَالْحُكْمُ
 وَاجْتِسَتْ بَنَى الْبَابِ لَدَى الْعَدَدِ وَارْتَضَى بَنَى لَاتَمَّ مَعَ الْاَجْنَادِ
 وَاحْكُمُوا بِالْآخِرَةِ بَعْدَ الْعَدِّ حَكْمُكُمْ فِيهِمْ عِنْدَ فَقْدِ الْحَدِّ
 وَالْإِخْتِ لَا فُضِّ مَعَ الْحَدِّ لَهَا فِيهَا عِدَاثَةٌ كَمَلَهَا
 رُوحٌ وَأَمَّ وَهْمًا ثَمَامُهَا فاعْلَمَ خَيْرُ أَعْتَمَ عَمَلُهَا
 تُعَرَّفُ بِأَصَاحِ بِالْأَكْثَرِ رِيَّةٍ وَهِيَ بَارِعَةٌ بِهَا حِدِيَّةٍ

فَيُقَضُّ النِّسْفُ لَهَا وَالسُّدُسُ لَهَا حَتَّى تَقُولَ بِالْقُرْبَى الْمُحْتَمِلَةَ
أَمْ يَقُولُ إِلَى الْمُقَاسِمَةِ كَمَا مَضَى نَا حِفْظُهُ وَاشْتَرَا نَا لَمْ
وَأِنْ تَرُدُّ مَعْرِفَةَ الْحِسَابِ لِنَهْنٍ فِيهِ إِلَى الصَّوَابِ
وَتَعْرِفُ النِّسْمَةَ وَالتَّفْصِيلَ وَتَعْلَمُ الصَّحِيحَ وَالْأَصُولَ
نَا سَخَّرَ الْأُصُولَ الْمَسَائِلَ وَلَا تَكُنْ كَمَنْ حَفِظَهَا بِذَاهِلٍ
وَهِيَ إِذَا فُضِّلَ فِيهَا الْقَوْلُ ثَلَاثَةٌ يَدْخُلُ فِيهَا الْعَوْلُ
وَبَعْدَهَا أَرْبَعَةٌ تَمَامٌ لِأَعْوَانٍ يَعْرِوْهَا وَلَا انْتِلَاؤُ
فَالسُّدُسُ مِثْلُ ثَلَاثَةِ أَشْهُمٍ ثَوَا وَالثَّلَاثُ وَالرَّبْعُ سِتُّونَ عَشْرًا
وَأَشْمُ الْإِصْبَعِ الْيَمِينِ السُّدُسُ فَأَصْلُهُ الصِّيَادُ وَفِيهِ الْخَدُّشُ
أَرْبَعَةٌ يَتَفَعَّلُ عَشْرُونَ يَجِدُ فِيهَا الْحِسَابَ أَجْمَعُونَ
هَذِهِ الثَّلَاثَةُ الْأُصُولُ الَّتِي كَثُرَتْ نَصُهَا حَوْلَ
فَتَبْلُغُ النِّسْمَةَ عَقْدَ الْعَشْرِ فِي صَوْنٍ مَعْرُوفٍ مُتَّطَرِّقَةٍ
وَتَلْحَقُ الَّتِي تَلِيهَا فِي الْأَنْزِلِ الْعَوْلُ أَفْرَادًا بِتَفَعُّلٍ
وَالْعَدَدُ الثَّلَاثُ قَدْ يَعْمَلُ بِمَنْبِهِ بِأَعْمَلٍ بِمَا أَقُولُ
وَالنِّصْفُ وَالْبَاقِي وَالنِّصْفَانِ أَصْلُهُمَا فِي حُكْمِهِمَا اثْنَانِ

والثالث من ثلثه يكون والرابع من أربعه فستون
 والشمس أربعان فمن ثمانية هذه هي الأصول الثمانية
 لا يدخل القول عليها فاعلم ثم اسلك التصحيح فيها وافهم
 فإن تكن من أصيها تصح فترك تطويل الحساب ربح
 فأعط كل سهم من أصله مكيلا أو عابلا من قوله
 وإن نوى السهام ليس تقسم على دور الميراث فاتبع فافهم
 وأطلب طريق الاختصار في العمل بالضرب والوقت بحاجتك
 وأردد إلى الوقت الذي يوافق واضربه في الأصل وانت الحار
 إن كان جنسا واحدا إذا كثرا فاحفظ ودع عند الجدار
 وإن تولى الكثر على اجناس فانها في الحكم عند الناس
 تحصر في أربعة أقسام يعرفها الماهر في الأحكام
 مماثل من يقدم من الميت ونفعه سواء مصاحب
 والربع المبين الخالف يليك عن تفصيل العاين
 فخذ من المائتين واحدا وخذ من الناسئين الزائد
 وخذ جميع العدة المبين واضربه في الثاني ولا تذاهر

القول

والمراد

وَأَضْرَبَتْ جَمِيعَ الْوَفُوقِ الْمُوَافِقِ وَأَسْبَلَتْ بِذَلِكَ أَنْهَجَ الطُّرُقِ
 وَأَضْرَبَتْهُ فِي الْأَصْلِ التَّنَاصُلِ وَأَخَصَّ مَا انْضَمَّ وَمَا تَجَمَّلَ
 وَأَنْشَمَهُ فَالْقِسْمُ إِذَا صَحِيحٌ يَعْرِفُهُ الْأَعْمَى وَالْفَصِيحُ
 هَذِهِ مِنَ الْحِسَابِ حُمْلٌ يَأْتِي عَلَى مِثَالِهِنَّ الْعَمَلُ
 مِنْ غَيْرِ تَطْوِيلٍ وَلَا اعْتِسَابٍ نَاقِضٍ بِنَافِئِهِنَّ فَهُوَ كَلَامٌ
 وَإِنْ يُمِيتُ آخِرُ قَبْلِ الْقِسْمِ حَقِّقِ السَّهَامَ وَاعْرِضْ نِسْمَهُ
 وَاجْعَلْ لَهُ مَسْأَلَةً أُخْرَى لِمَا قَدْ يَنْشُرُ التَّفْصِيلَ فِيهَا ثَدِّمَا
 وَانْظُرْ نَارَ رَفَعْتَ السَّهَامَ فَحَدِّثْ وَفَقِّهَا ثَمَامَ
 وَأَضْرَبَتْهُ أَوْ جَمِيعَهَا فِي السَّابِقَةِ إِنْ لَمْ يَكُنْ بَيْنَهُمَا مُوَافَقَةٌ
 فَلَا سَهْمٌ الْآخَرَى فِي السَّهَامِ تَضَرُّبٌ أَوْ ٢ وَفَقِّهَا ثَمَامَ
 وَكُلُّ سَهْمٍ ٢ جَمِيعُ الثَّانِيَةِ يُضْرَبُ أَوْ ٢ وَفَقِّهَا عَلَانِيَةً
 هَذِهِ طَرِيقَةُ الْمُنَاسَخَةِ فَارْزُقْ نَهَارُ ثَبَتَ فَضْلُ سَاحَةِ
 وَإِنْ يَكُنْ فِي مَنَاحِجِ الْمَالِ خَشْيٌ صَحِيحٌ يَسَّرُ الْأَشْيَاءَ
 فَانْشُرْ عَلَى الْأَقْلِ وَالْيَقِينِ بِحُطْحُوتِ الْقِسْمَةِ الْمَبِينِ
 وَمَعْلُومَاتُ حُلْمِ زِدَاتِ الْجَمَلِ يَنْشُرُ عَلَى الْيَقِينِ وَالْأَقْلِ

وَأَنْ تَمُتَ قَوْمٌ يَهْدِمُ أَوْ غَرَنَ أَوْ حَادِثَ عَمِّ الْجَمِيعِ كَالْجَدِّ
وَلَمْ يَكُنْ يُعْلَمُ خَالُ السَّابِقِينَ فَلَا يُورِثُ نَافِعٌ مِمَّنْ نَافِعٌ
تَعْدَمُ كَأَنَّهُمْ أَجَانِبٌ وَهَكَذَا الرَّأْيُ السَّدِيدُ الصَّابِتُ
وَقَدَانِي الْقَوْلُ عَلَى مَا شِئْنَا مِنْ قِسْمَةِ الْمِيرَاثِ كَيْ يَبْتَنِيَ
عَلَى مَرْنِ الرِّمَزِ وَالْإِسَاءَةِ مُلْخَصًا بِأَوْحَازِ الْعِبَارَةِ
فَالْحَمْدُ لِلَّهِ عَلَى التَّمَامِ حَمْدًا كَثِيرًا تَبْدَأُ بِذَوَامِ
وَتَسْتَلِ الْعَفْوَ عَنِ التَّقْصِيرِ وَخَيْرٌ مَا نَاصِلٌ الْمَصِيرِ
وَعَفْوُ مَا كَانَ مِنَ الذُّنُوبِ وَشَرٌّ مَا كَانَ مِنَ الْعُيُوبِ
وَأَفْضَلُ الصَّلَاةِ وَالتَّسْلِيمِ عَلَى النَّبِيِّ الْمُصْطَفَى الْكَرِيمِ
مُحَمَّدٍ خَيْرِ الْأَنَامِ الْعَاقِبِ وَآلِهِ الْغُرَّةِ ذَوِي الْمَنَاقِبِ
وَضَحِيَّةِ الْأَنَاضِلِ الْأَبْرَارِ الصَّفْوَةِ الْأَمَّا بِلَا خِيَارٍ
وَحَسْبُكَ اللَّهُ وَنِعْمَ الْكَافِي ذُو الْعِزِّ وَالْقُدْرَةِ وَالْأَطْنَابِ

تَمَّتْ وَالْحَمْدُ لِلَّهِ الرَّعْمَانِ وَسَلَوَاتُهُ وَسَلَامُهُ
عَلَى سَيِّدِ الْحَمْدِ مُحَمَّدٍ وَآلِهِ وَصَحْبِهِ الطَّيِّبِ الطَّاهِرِ
لَيْلَةَ الْجُمُعَةِ الْأَرْبَعِ لِيَا خَلَوْنَ مِنْ شَوَالِ سَنَةِ ١٢٨٥ وَسَعَادَةٍ
شَوْبَانَ سَعَادَةٍ لِحَاسَنَاتِهَا عَفَاةً

152. ' Or, *if no deduction be made*, let some
' person learned in the law divide the whole
' collected estate into ten parts, and make a
' legal distribution by this *following* rule:

153. ' Let the son of the *Bráhmaṇi* take four
' parts; the son of the *Cśbatriyá*, three; let the
' son of the *Vaiśyá* have two parts; let the son
' of the *Súdra* take a single part, *if he be vir-*
' *tuous*.

154. ' But whether the *Bráhmaṇi* have sons,
' or have no sons, *by wives of the three first*
' *classes*, no more than a tenth part must be
' given to the son of a *Súdra*.

155. ' The son of a *Bráhmaṇi*, a *Cśbatriyá*, or
' a *Vaiśyá* by a woman of the servile class, shall
' inherit no part of the estate, *unless he be vir-*
' *tuous*; *nor jointly with other sons, unless his mo-*
' *ther was lawfully married*: whatever his fa-
' ther may give him, let that be his own.

156. ' All the sons of twiceborn men, pro-
' duced by wives of the same class, must divide
' the heritage equally, after the younger bro-
' thers have given the first born his deducted
' allotment.

157. ' For a *Súdra* is ordained a wife of his
' own class, *and* no other: all, produced by her,
' shall have equal shares, though she have a
' hundred sons.

158. ' Of the twelve sons of men, whom

‘ MENU, sprung from the Self-existent, has
 ‘ named, six are kinsmen and heirs ; six, not
 ‘ heirs, *except to their own fathers*, but kinsmen.

159. ‘ The son begotten by a man himself
 ‘ *in lawful wedlock*, the son of his wife begotten
 ‘ *in the manner before described*, a son given to
 ‘ *him*, a son made or adopted, a son of concealed
 ‘ birth, or *whose real father cannot be known*, and
 ‘ a son rejected by his natural parents, are the
 ‘ six kinsmen and heirs :

160. ‘ The son of a young woman *unmarried*,
 ‘ the son of a pregnant bride, a son bought, a
 ‘ son by a twice married woman, a son self-
 ‘ given, and a son by a *Súdra*, are the six kins-
 ‘ men, but not heirs to *collaterals*.

161. ‘ Such advantage, as a man would gain,
 ‘ who should attempt to pass deep water in a
 ‘ boat made of woven reeds, that father obtains,
 ‘ who passes the gloom of death, leaving only
 ‘ contemptible sons, *who are the eleven, or at least*
 ‘ *the six, last mentioned*.

162. ‘ If the two heirs of one man be the
 ‘ son of his own body and a son of his wife by
 ‘ a kinsman, *the former of whom was begotten*
 ‘ *after his recovery from an illness thought incurable*, each of the sons, exclusively of the other,
 ‘ shall succeed to the whole estate of his natural
 ‘ father.

163. ‘ The son of his own body is the sole

heir to his estate, but, that all evil may be removed, let him allow a maintenance to the rest;

164. ' And, when the son of the body has taken an account of the paternal inheritance, let him give a sixth part of it to the son of the wife begotten by a kinsman, *before his father's recovery*; or a fifth part, *if that son be eminently virtuous*.

165. ' The son of the body, and the son of the wife may succeed *immediately* to the paternal estate *in the manner just mentioned*; but the ten other sons can only succeed in order to the family duties and to their share of the inheritance, *those last named being excluded by any one of the preceding*.

166. ' HIM, whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body.

167. ' He, who was begotten, according to law, on the wife of a man deceased, or impotent, or disordered, after due authority given to her, is called the lawful son of the wife.

168. ' He, whom his father, or mother *with her husband's assent*, gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, *the gift being confirmed by pouring water*.

169. ' He is considered as a son made or
 ' *adopted*, whom a man takes as his own son,
 ' the boy being equal in class, endued with filial
 ' virtues, acquainted with *the merit of perform-*
 ' *ing obsequies to his adopter*, and with *the sin of*
 ' *omitting them*.

170. ' In whose mansions soever a male
 ' child shall be brought forth *by a married wo-*
 ' *man, whose husband has long been absent*, if the
 ' real father cannot be discovered, *but if it be*
 ' *probable that he was of an equal class*, that child
 ' belongs to the lord of the *unfaithful* wife, and
 ' is called a son of concealed birth in his man-
 ' sion.

171. ' A boy, whom a man receives as his
 ' own son, after he has been deserted *with-*
 ' *out just cause* by his parents, or by either of
 ' them, *if one be dead*, is called a son rejected.

172. ' A son, whom the daughter of any
 ' man privately brings forth in the house of her
 ' father, if she *afterwards* marry her lover, is
 ' described as a son begotten on an unmarried
 ' girl.

173. ' If a pregnant young woman marry,
 ' whether her pregnancy be known or unknown,
 ' the male child in her womb belongs to the
 ' bridegroom, and is called a son received with
 ' his bride.

174. ' He is called a son bought, whom a

‘ man, for the sake of having a son *to perform his*
 ‘ *obsequies*, purchases from his father and mo-
 ‘ ther, whether the boy be equal or unequal *to*
 ‘ *himself in good qualities*, for in *class* all adopted
 ‘ *sons must be equal*.

175. ‘ He, whom a woman, either forsaken
 ‘ by her lord or a widow, conceived by a second
 ‘ husband, whom she took by her own desire,
 ‘ *though against law*, is called the son of a wo-
 ‘ man twice married:

176. ‘ If, *on her second marriage*, she be still
 ‘ a virgin, or if she left her husband under the
 ‘ age of puberty and return to him at his full
 ‘ age, she must again perform the nuptial cere-
 ‘ mony, *either with her second, or her young and*
 ‘ *deserted*, husband.

177. ‘ He, who has lost his parents, or been
 ‘ abandoned *by them* without just cause, and
 ‘ offers himself to a man *as his son*, is called a
 ‘ son selfgiven.

178. ‘ A son, begotten through lust on a *Sú-*
 ‘ *dra* by a man of the priestly class, is even as
 ‘ a corpse, though alive, and is thence called in
 ‘ law a living corpse:

179. ‘ But a son, begotten by a man of the
 ‘ servile class on his female slave, or on the fe-
 ‘ male slave of his male slave, may take a
 ‘ share of the heritage, if permitted *by the other*
 ‘ *sons*: thus is the law established.

180. ' These eleven sons (the son of the wife,
 ' and the rest as enumerated) are allowed by
 ' wise legislators to be substitutes *in order* for
 ' sons of the body, for the sake of preventing a
 ' failure of obsequies ;

181. ' Though such, as are called sons for
 ' that purpose, but were produced from the
 ' manhood of others, belong in truth to the fa-
 ' ther, from whose manhood they feverally
 ' sprang, and to no other, *except by a just fiction*
 ' *of law.*

182. ' If, among several brothers of the
 ' whole blood, one have a son born, MENU
 ' pronounces them all fathers of a male child
 ' by means of that son ; *so that, if such nephew*
 ' *would be the heir, the uncles have no power to*
 ' *adopt sons :*

183. ' Thus if, among all the wives of the
 ' same husband, one bring forth a male child,
 ' MENU has declared them all, by means of
 ' that son, to be mothers of male issue.

184. ' On failure of the best, *and of the next*
 ' *best, among those twelve sons,* let the inferiour
 ' in order take the heritage ; but, if there be
 ' many of equal rank, let all be sharers of the
 ' estate.

185. ' Not brothers, nor parents, but sons,
 ' *if living, or their male issue,* are heirs to the de-
 ' ceased, but of him, who leaves no son, *nor a*

‘ wife, nor a daughter, the father shall take the inheritance; and, if he leave neither father, nor mother, the brothers.

186. ‘ To three *ancestors* must water be given at their obsequies; for three (*the father, his father, and the paternal grandfather*) is the funeral cake ordained: the fourth *in descent* is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake.

187. ‘ To the nearest *śapinda*, male or female, after him in the third degree, the inheritance next belongs; then, on failure of *śapindas* and of their issue, the *samānōdaca*, or distant kinsman, shall be the heir; or the spiritual preceptor, or the pupil, or the fellowstudent, of the deceased:

188. ‘ On failure of all those, the lawful heirs are such *Brāhmins*, as have read the three *Vēdas*, as are pure in body and mind, as have subdued their passions; and they must consequently offer the cake: thus the rites of obsequies cannot fail.

189. ‘ The property of a *Brāhmen* shall never be taken as an *escheat* by the king: this is a fixed law: but the wealth of the other classes on failure of all heirs, the king may take.

190. ‘ If the widow of a man, who died

‘ without a son, raise up a son to him by one of
 ‘ his kinsmen, let her deliver to that son, *at his*
 ‘ *full age*, the collected estate of the deceased,
 ‘ whatever it be.

191. ‘ If two sons, begotten by two *successive*
 ‘ *husbands, who are both dead*, contend for their
 ‘ property, then in the hands of their mother,
 ‘ let each take, exclusively of the other, his own
 ‘ father’s estate.

192. ‘ ON the death of the mother, let all
 ‘ the uterine brothers, and the uterine sisters, *if*
 ‘ *unmarried*, equally divide the maternal estate:
 ‘ *each married sister shall have a fourth part of a*
 ‘ *brother’s allotment*.

193. ‘ Even to the daughters of those
 ‘ daughters, it is fit, that something should be
 ‘ given, from the assets of their maternal grand-
 ‘ mother, on the score of natural affection.

194. ‘ WHAT was given before the nuptial
 ‘ fire, what was given on the bridal procession,
 ‘ what was given in token of love, and what
 ‘ was received from a brother, a mother, or a
 ‘ father, are considered as the sixfold *separate*
 ‘ property of a *married* woman :

195. ‘ What she received after marriage
 ‘ from the family of her husband, and what
 ‘ her affectionate lord may have given her, shall
 ‘ be inherited, even if she die in his lifetime, by
 ‘ her children.

196. ' It is ordained, that the property of a
' woman, married by the ceremonies called
' *Bráhma, Daiva, Arsha, Gándharva*, or *Prá-*
' *jápatya*, shall go to her husband, if she die
' without issue.

197. ' But her wealth given on the marriage
' called *Asura*, or on either of the *two* others, is
' ordained, on her death without issue, to be-
' come the property of her father and mother.

198. ' If a widow, *whose husband had other*
' *wives of different classes*, shall have received
' wealth at any time *as a gift* from her father,
' *and shall die without issue*, it shall go to the
' daughter of the *Bráhmaṇi* wife, or to the issue
' of that daughter.

199. ' A woman should never make a hoard
' from the goods of her kindred, *which are*
' common to *her and* many; or even from the
' property of her lord, without his assent.

200. ' Such ornamental apparel, as women
' wear during the lives of their husbands, the
' heirs of those husbands shall not divide among
' themselves: they, who divide it among them-
' selves, fall deep *into sin*.

201. ' Eunuchs and outcasts, persons born
' blind or deaf, madmen, idiots, the dumb, and
' such as have lost the use of a limb, are excluded
' from a share of the heritage;

202. ' But it is just, that the heir, whe

‘ knows his duty, should give all of them food
 ‘ and raiment *for life* without stint, according to
 ‘ the best of his power: he, who gives them
 ‘ nothing, sinks assuredly *to a region of punish-*
 ‘ *ment.*

203. ‘ If the eunuch and the rest should at
 ‘ any time desire to marry, *and if the wife of the*
 ‘ *eunuch should raise up a son to him by a man le-*
 ‘ *gally appointed, that son and the issue of such,*
 ‘ as have children, shall be capable of inheriting.

204. ‘ After the death of the father, if the
 ‘ eldest brother acquire *wealth by his own efforts*
 ‘ *before partition*, a share of that *acquisition* shall
 ‘ go to the younger brothers, if they have made
 ‘ a due progress in learning;

205. ‘ And if all of them, being unlearned,
 ‘ acquire property *before partition* by their own
 ‘ labour, there shall be an equal division of that
 ‘ property *without regard to the first born*; for it
 ‘ was not the wealth of their father: this rule is
 ‘ clearly settled.

206. ‘ Wealth, however, acquired by learn-
 ‘ ing, belongs exclusively to any one *of them,*
 ‘ *who acquired it*; so does any thing given by a
 ‘ friend, received on account of marriage, or
 ‘ presented as a mark of respect to a guest.

207. ‘ If any one of the brethren has a com-
 ‘ petence from his own occupation, and wants
 ‘ not the property *of his father*, he may debar

‘ himself from his own share, some trifle being
 ‘ given him as a consideration. *to prevent future*
 ‘ *strife.*

208. ‘ What a brother has acquired by la-
 ‘ bour or skill, without using the patrimony, he
 ‘ shall not give up without his assent ; for it was
 ‘ gained by his own exertion :

209. ‘ And if a son, by his own efforts, re-
 ‘ cover *a debt or property unjustly detained*, which
 ‘ could not be recovered before *by his father*, he
 ‘ shall not, unless by his free will, put it into
 ‘ parcenary with his brethren, since in fact it
 ‘ was acquired by himself.

210. ‘ If brethren, once divided and living
 ‘ again together as parceners, make a second
 ‘ partition, the shares must in that case be
 ‘ equal ; and the first born shall have no right of
 ‘ deduction.

211. ‘ Should the eldest or youngest of seve-
 ‘ ral brothers be deprived of his share *by a civil*
 ‘ *death on his entrance into the fourth order*,
 ‘ or should any one of them die, his *vested inter-*
 ‘ *est in a share* shall not wholly be lost ;

212. ‘ But, *if he leave neither son, nor wife,*
 ‘ *nor daughter, nor father, nor mother*, his uter-
 ‘ ine brothers and sisters, and such brothers as
 ‘ were reunited after a separation, shall assemble
 ‘ and divide his share equally.

213. ‘ Any eldest brother, who from avarice
 ‘ shall defraud his younger brother, shall forfeit

‘ *the honours of his primogeniture, be deprived*
‘ *of his own share, and pay a fine to the king.*

214. ‘ All those brothers, who are addicted
‘ to any vice, lose their title to the inheritance:
‘ the first born shall not appropriate it to him-
‘ self, but shall give shares to the youngest, *if*
‘ *they be not vitious.*

215. ‘ If, among undivided brethren *living*
‘ with their father, there be a common exertion
‘ for common gain, the father shall never make
‘ an unequal division among them, *when they*
‘ *divide their families.*

216. ‘ A son, born after a division *in the*
‘ *lifetime of his father*, shall alone inherit the
‘ patrimony, or shall have a share of it with the
‘ divided brethren, if they return and unite
‘ themselves with him.

217. ‘ OF a son, dying childless *and leaving*
‘ *no widow*, the *father and* mother shall take the
‘ estate; and, the mother also being dead, the
‘ paternal *grandfather and* grandmother shall
‘ take the heritage *on failure of brothers and ne-*
‘ *phews.*

218. ‘ When all the debts and wealth have
‘ been justly distributed according to law, any
‘ property, that may afterwards be discovered,
‘ shall be subject to a similar distribution.

219. ‘ Apparel, carriages, or riding horses,
‘ and ornaments of *ordinary value*, which any of
‘ *the heirs had used by consent before partition,*

‘ dressed rice, water *in a well or cistern*, female
 ‘ slaves, family priests, or spiritual counsellors,
 ‘ and pasture ground for cattle, the wife have
 ‘ declared indivisible, *and still to be used as be-*
 ‘ *fore.*

220. ‘ Thus have the laws of inheritance,
 ‘ and the rule for the conduct of sons (whether
 ‘ the son of the wife or others) been expound-
 ‘ ed to you in order: learn at present the law
 ‘ concerning games of chance.

221. ‘ GAMING, either with inanimate or
 ‘ with animated things, let the king exclude
 ‘ wholly from his realm: both those modes of
 ‘ play cause destruction to princes.

222. ‘ Such play with dice *and the like*, or by
 ‘ matches *between rams and cocks*, amounts to
 ‘ open theft; and the king must ever be vigilant
 ‘ in suppressing both *modes of play*:

223. ‘ Gaming with lifeless things is known
 ‘ among men by the name of *dyûta*; but *sa-*
 ‘ *mâbwaya* signifies a match between living
 ‘ creatures.

224. ‘ Let the king punish corporally at dis-
 ‘ cretion both the gamester and the keeper of a
 ‘ gaming house, whether they play with inani-
 ‘ mate or animated things: and men of the
 ‘ servile class, who wear the *string and other*
 ‘ marks of the twiceborn.

225. ‘ Gamesters, publick dancers and sing-

‘ ers, revilers of scripture, open hereticks, men
 ‘ who perform not the duties of their several
 ‘ classes, and sellers of spirituous liquor, let him
 ‘ instantly banish from the town :

226. ‘ Those wretches, lurking like unseen
 ‘ thieves in the dominion of a prince, conti-
 ‘ nually harass his good subjects with their viti-
 ‘ ous conduct,

227. ‘ Even in a former creation was this
 ‘ *vice* of gaming found a great provoker of en-
 ‘ mity; let no sensible man, therefore, addict
 ‘ himself to play even for his amusement:

228. ‘ On the man addicted to it, either pri-
 ‘ vately or openly, let punishment be inflicted
 ‘ at the discretion of the king.

229. ‘ A MAN of the military, commercial,
 ‘ or servile class, who cannot pay a fine, shall
 ‘ discharge the debt by his labour: a priest shall
 ‘ discharge it by little and little.

230. ‘ For women, children, persons of crazy
 ‘ intellect, the old, the poor, and the infirm,
 ‘ the king shall order punishment with a small
 ‘ whip, a twig, or a rope.

231. ‘ THOSE ministers, who are employed
 ‘ in publick affairs, and, inflamed by the blaze
 ‘ of wealth, mar the business or any person
 ‘ concerned, let the king strip of all their pro-
 ‘ perty.

232. ‘ Such, as forge royal edicts, cause dis-

‘ fensions among the great ministers, or kill
 ‘ women, priests, or children, let the king put
 ‘ to death; and such, as adhere to his enemies.

233. ‘ Whatever business has at any time
 ‘ been transacted conformably to law, let him
 ‘ consider as finally settled, and refuse to un-
 ‘ ravel;

234. ‘ But whatever business has been con-
 ‘ cluded illegally by his ministers or by a judge,
 ‘ let the king himself reexamine; and let him
 ‘ fine them each a thousand *panas*.

235. ‘ The slayer of a priest, a soldier or
 ‘ merchant drinking arak, or a priest drinking
 ‘ arak, mead, or rum, he, who steals the gold of
 ‘ a priest, and he, who violates the bed of his
 ‘ *natural or spiritual* father, are all to be con-
 ‘ sidered respectively as offenders in the highest
 ‘ degree, *except those, whose crimes are not fit to*
 ‘ *be named:*

236. ‘ On such of those four, as have not
 ‘ actually performed an expiation, let the king
 ‘ legally inflict corporal punishment, together
 ‘ with a fine.

237. ‘ For violating the paternal bed, let *the*
 ‘ *mark of a female part* be impressed *on the fore-*
 ‘ *head with hot iron*; for drinking spirits, a vint-
 ‘ ner’s flag; for stealing sacred gold, a dog’s
 ‘ foot; for murdering a priest, *the figure of a*
 ‘ headless corpse:

238. ' With none to eat with them, with
 ' none to sacrifice with them, with none to
 ' read with them, with none to be allied by
 ' marriage to them, abject and excluded from
 ' all social duties, let them wander over this
 ' earth:

239. ' Branded with *indelible* marks, they
 ' shall be deserted by their paternal and mater-
 ' nal relations, treated by none with affection,
 ' received by none with respect: such is the or-
 ' dinance of MENU.

240. ' *Criminals of* all the classes, having
 ' performed an expiation, as ordained by law,
 ' shall not be marked on the forehead, but con-
 ' demned to pay the highest fine:

241. ' For crimes by a priest, *who had a*
 ' *good character before his offence*, the middle
 ' fine shall be set on him; or, *if his crime was*
 ' *premeditated*, he shall be banished from the
 ' realm, *taking with him* his effects and his fa-
 ' mily;

242. ' But men of the other classes, who
 ' have committed those crimes, *though without*
 ' *premeditation*, shall be stripped of all their pos-
 ' sessions; and, if their offence was premedi-
 ' tated, shall be corporally, or even capitally,
 ' punished, *according to circumstances*.

243. ' LET no virtuous prince appropriate
 ' the wealth of a criminal in the highest degree;

‘ for he, who appropriates it through covetousness, is contaminated with the same guilt:

244. ‘ Having thrown such a fine into the waters, let him offer it to VARUNA; or let him bestow it on some priest of eminent learning in the scriptures :

245. ‘ VARUNA is the lord of punishment; he holds a rod even over kings; and a priest, who has gone through the whole *Véda*, is equal to a sovereign of all the world.

246. ‘ Where the king abstains from receiving to his own use the wealth of such offenders, there children are born in due season and enjoy long lives;

247. ‘ *There* the grain of husbandmen rises abundantly, as it was respectively sown; there no younglings die, nor is one deformed animal born.

248. ‘ SHOULD a man of the basest class, with preconceived malice, give pain to *Bráhmens*, let the prince corporally punish him by various modes, that may raise terror.

249. ‘ A king is pronounced equally unjust in releasing the man, who deserves punishment, and in punishing the man, who deserves it not: he is just, who always inflicts the punishment ordained by law.

250. ‘ These established rules for administering justice, between two litigant parties, have

‘ been propounded at length under eighteen
‘ heads.

251. ‘ Thus fully performing all duties re-
‘ quired by law, let a king seek *with justice* to
‘ possess regions yet unpossessed, and, when
‘ they are in his possession, let him govern them
‘ well.

252. ‘ His realm being completely arranged
‘ and his fortresses amply provided, let him ever
‘ apply the most diligent care to eradicate *bad*
‘ *men resembling* thorny weeds, as the law di-
‘ rects.

253. ‘ By protecting such as live virtuously,
‘ and by rooting up such as live wickedly, those
‘ kings, whose hearts are intent on the security
‘ of their people, shall rise to heaven.

254. ‘ Of that prince, who takes a revenue,
‘ without restraining rogues, the dominions are
‘ thrown into disorder, and himself shall be pre-
‘ cluded from a celestial abode;

255. ‘ But of him, whose realm, by the
‘ strength of his arm, is defended and free from
‘ terrour, the dominions continually flourish,
‘ like trees duly watered.

256. ‘ Let the king, whose emissaries are
‘ his eyes, discern well the two sorts of rogues,
‘ the open and the concealed, who deprive
‘ other men of their wealth:

257. ‘ Open rogues are they, who subsist by

‘ cheating in various marketable commodities;
 ‘ and concealed rogues are they, who steal and
 ‘ rob in forests and the like secret places.

258. ‘ Receivers of bribes, extorters of money by threats, debasers of metals, gamesters, fortunetellers, imposters, and professors of palmistry;

259. ‘ Elephant breakers and quacks, not performing what they engage to perform, pretended artists, and subtil harlots;

260. ‘ These and the like thorny weeds, overspreading the world, let the king discover with a quick sight, and others, who act ill in secret; worthless men, yet bearing the outward signs of the worthy.

261. ‘ Having detected them, by the means of trusty persons disguised, who *pretend to* have the same occupation with them, and of spies placed in several stations, let him bring them by artifice into his power:

262. ‘ Then, having fully proclaimed their respective criminal acts, let the king inflict punishment legally, according to the crimes proved;

263. ‘ Since, without certain punishment, it is impossible to restrain the delinquency of scoundrels with depraved souls, who secretly prowl over this earth.

264. ‘ Muchfrequented places, cisterns of

‘ water, bake houses, the lodgings of harlots,
 ‘ taverns and victualling shops, squares where
 ‘ four ways meet, large well known trees,
 ‘ assemblies, and publick spectacles ;

265. ‘ Old courtyards, thickets, the houses
 ‘ of artists, empty mansions, groves, and gar-
 ‘ dens;

266. ‘ These and the like places let the king
 ‘ guard, for the prevention of robberies, with
 ‘ soldiers, both stationary and patrolling, as well
 ‘ as with secret watchmen.

267. ‘ By the means of able spies, once
 ‘ thieves *but reformed*, who, well knowing the
 ‘ various machinations of rogues, associate with
 ‘ them and follow them, let the king detect and
 ‘ draw them forth :

268. ‘ On pretexts of dainty food and gra-
 ‘ tifications, or of seeing some wife priest, *who*
 ‘ *could ensure their success*, or on pretence of
 ‘ *mock battles and the like* feats of strength, let
 ‘ the spies procure an assembly of those men.

269. ‘ Such as refuse to go forth on those oc-
 ‘ casions, deterred by *former punishments, which*
 ‘ the king *had inflicted*, let him *seize* by force,
 ‘ *and* put to death, *on proof of their guilt*, with
 ‘ their friends and kinsmen, paternal and ma-
 ‘ ternal, *if proved to be their confederates*.

270. ‘ Let not a just prince kill a man con-
 ‘ victed of simple theft, unless taken with the

‘ mainer or with implements of robbery; but
 ‘ any thief, taken with the mainer, or with
 ‘ such implements, let him destroy without he-
 ‘ sitation;

271. ‘ And let him slay all those, who give
 ‘ robbers food in towns, or supply them with
 ‘ implements, or afford them shelter.

272. ‘ Should those men, who are appointed
 ‘ to guard any districts, or those of the vicinity,
 ‘ who were employed for that purpose, be neu-
 ‘ tral in attacks by robbers *and inactive in seiz-*
 ‘ *ing them*, let him instantly punish them as
 ‘ thieves.

273. ‘ Him, who lives *apparently* by the
 ‘ rules of his class, but *really* departs from those
 ‘ rules, let the king severely punish by fine, as a
 ‘ wretch, who violates his duty.

274. ‘ They, who give no assistance on the
 ‘ plundering of a town, on the forcible breaking
 ‘ of a dike, or on seeing a robbery on the high-
 ‘ way, shall be banished with their cattle and
 ‘ utensils.

275. ‘ Men, who rob the king’s treasure, or
 ‘ obstinately oppose his commands, let him de-
 ‘ stroy by various modes of just punishment;
 ‘ and those, who encourage his enemies.

276. ‘ Of robbers, who break a wall or
 partition, and commit theft in the night, let

‘ the prince order the hands to be lopped off,
 ‘ and themselves to be fixed on a sharp stake.

277. ‘ Two fingers of a cutpurse, *the thumb*
 ‘ *and the index*, let him cause to be amputated
 ‘ on his first conviction; on the second, one
 ‘ hand and one foot; on the third, he shall suffer
 ‘ death.

278. ‘ Such, as give thieves fire, such as give
 ‘ them food, such as give them arms and apart-
 ‘ ments, and such as knowingly receive a thing
 ‘ stolen, let the king punish as *he would punish a*
 ‘ thief.

279. ‘ The breaker of a *dam to secure a pool*,
 ‘ let him punish by long immersion under
 ‘ water or by keen corporal suffering; or the of-
 ‘ fender shall repair it, but must pay the highest
 ‘ mulct.

280. ‘ Those, who break open the treasury,
 ‘ or the arsenal, or the temple of a deity, and
 ‘ those, who carry off royal elephants, horses,
 ‘ or cars, let him without hesitation destroy.

281. ‘ He, who shall take away the water of
 ‘ an ancient pool, or shall obstruct a watercourse,
 ‘ must be condemned to pay the lowest usual
 ‘ amercement.

282. ‘ HE, who shall drop his ordure on the
 ‘ king’s highway, except in case of necessity,
 ‘ shall pay two *panas* and immediately remove
 ‘ the filth.

283. ' But a person in urgent necessity, a
 ' very old man, a pregnant woman, and a child,
 ' only deserve reproof, and shall clean the place
 ' themselves: that is a settled rule.

284. ' ALL physicians and surgeons acting
 ' unskilfully in their several professions, must
 ' pay for *injury to* brute animals the lowest, but
 ' for *injury to* human creatures the middle,
 ' amercement.

285. ' THE breaker of a footbridge, of a pub-
 ' lick flag, of a palisade, and of idols *made of*
 ' *clay*, shall repair what he has broken, and pay
 ' a mulct of five hundred *panas*.

286. ' FOR mixing impure with pure com-
 ' modities, for piercing fine gems, *as diamonds*
 ' *or rubies*, and for boring *pearls or inferiour*
 ' *gems* improperly, the fine is the lowest of the
 ' three; *but damages must always be paid*.

287. ' THE man, who shall deal unjustly
 ' with purchasers at a fair price *by delivering*
 ' *goods of less value*, or shall sell at a high price
 ' *goods of ordinary value*, shall pay *according to*
 ' *circumstances*, the lowest or the middle amerce-
 ' ment.

288. ' LET the king place all prisons near a
 ' publick road, where offenders may be seen
 ' wretched or disfigured.

289. ' HIM, who breaks down a *publick*
 ' wall, him, who fills up a *publick* ditch, him,

‘ who throws down a *publick* gate, the king shall
 ‘ speedily banish.

290. ‘ FOR all sacrifices to destroy innocent
 ‘ men, the punishment is a fine of two hundred
 ‘ *panas*; and for machinations with *poisonous*
 ‘ roots, and for the various *charms and witch-*
 ‘ *eries intended to kill*, by persons not effecting
 ‘ their purpose.

291. ‘ THE feller of bad grain for good, or of
 ‘ good seed placed at the top of *the bag*, to con-
 ‘ ceal *the bad below*, and the destroyer of known
 ‘ landmarks, must suffer such corporal punish-
 ‘ ment as will disfigure them;

292. ‘ But the most pernicious of all de-
 ‘ ceivers is a goldsmith, who commits frauds:
 ‘ the king shall order him to be cut piecemeal
 ‘ with razors.

293. ‘ FOR stealing implements of husban-
 ‘ dry, weapons, and prepared medicines, let
 ‘ the king award punishment according to the
 ‘ time and according to their use.

294. ‘ THE king, and his council, his me-
 ‘ tropolis, his realm, his treasure, and his army,
 ‘ together with his ally, are the seven members
 ‘ of his kingdom; whence it is called *Septanga*:

295. ‘ Among those seven members of a
 ‘ kingdom, let him consider the ruin of the
 ‘ first, and so forth in order, as the greatest
 ‘ lamity;

296. ' Yet, in a sevenparted kingdom here
' below, there is no supremacy among the se-
' veral parts, from any preeminence in useful
' qualities: but all the parts must reciprocally
' support each other; like the three staves of a
' holy mendicant :

297. ' In these and those acts, *indeed*, this
' and that member may be distinguished; *and*
' the member, by which any affair is trans-
' acted, has the preeminence in that particular
' affair.

298. ' WHEN the king employs emissaries,
' when he exerts power, when he regulates
' publick business, let him invariably know both
' his own strength and that of his enemy;

299. ' With all *their several* distresses and
' vices: let him then begin his operations, hav-
' ing maturely considered the greater and less
' importance of *particular acts*:

300. ' Let him, *though frequently disappointed*,
' renew his operations, how fatigued soever,
' again and again: since fortune always attends
' the man, who, *having begun well*, strenuously
' renews his efforts.

301. ' ALL the ages, called *Satya, Trétá,*
' *Dwápara*, and *Cali*, depend on the conduct of
' the king; who is declared *in turn* to represent
' each of those ages :

302. ' Sleeping, he is the *Cali* age; waking

‘ the *Dwāpara*; exerting himself in action, the
 ‘ *Tréta*; living virtuously, the *Satya*.

303. ‘ Of INDRA, of SU’RYA, of PAVANA,
 ‘ of YAMA, of VARUNA, of CHANDRA, of
 ‘ AGNI, and of PRĪT’HIVĪ, let the king emulate
 ‘ the power and attributes.

304. ‘ As INDRA sheds plentiful showers
 ‘ during the four rainy months, thus let him,
 ‘ acting like the regent of clouds, rain just gra-
 ‘ tifications over his kingdom :

305. ‘ As SU’RYA with strong rays draws up
 ‘ the water during eight months, thus let him,
 ‘ performing the function of the sun, gradually
 ‘ draw from his realm the legal revenue :

306. ‘ As PAVANA, when he moves, per-
 ‘ vades all creatures, thus let him, imitating
 ‘ the regent of wind, pervade *all places* by his
 ‘ concealed emissaries :

307. ‘ As YAMA, at the appointed time,
 ‘ punishes friends and foes, *or those who revere,*
 ‘ *and those who condemn, him,* thus let the king,
 ‘ resembling the judge of departed spirits,
 ‘ punish offending subjects.

308. ‘ As VARUNA most assuredly binds the
 ‘ guilty in fatal cords, thus let him, represent-
 ‘ ing the genius of water, keep offenders in
 ‘ close confinement :

309. ‘ When the people are no less delighted
 ‘ on seeing the king, than on seeing the full

‘ moon, he appears in the character of CHAN-
‘ DRA :

310. ‘ Against criminals let him ever be ar-
‘ dent in wrath, let him be splendid in glory,
‘ let him consume wicked ministers, thus
‘ emulating the functions of AGNI, regent of
‘ fire.

311. ‘ As PRĪT’HIVĪ supports all creatures
‘ equally, thus a king, sustaining all subjects,
‘ resembles in his office the goddess of earth.

312. ‘ Engaged in these duties and in others,
‘ with continual activity, let the king *above all*
‘ *things* restrain robbers, both in his own terri-
‘ tories and in those of other princes, *from which*
‘ *they come, or in which they seek refuge.*

313. ‘ LET him not, although in the great-
‘ est distress *for money*, provoke *Brāhmens* to
‘ anger *by taking their property*; for they, once
‘ enraged, could immediately *by sacrifices and*
‘ *imprecations* destroy him with his troops, ele-
‘ phants, horses and cars.

314. ‘ Who, without perishing, could pro-
‘ voke those holy men, by whom, *that is, by*
‘ *whose ancestors, under BRAHMA*’, the alld-
‘ vouring fire was created, the sea with waters
‘ not drinkable, and the moon with its wane
‘ and increase?

315. ‘ What prince could gain wealth by
‘ oppressing those, who, if angry, could frame

‘ other worlds and regents of worlds, could give
 ‘ being to new gods and mortals ?

316. ‘ What man, desirous of life, would
 ‘ injure those, by the aid of whom, *that is, by*
 ‘ *whose oblations*, worlds and gods perpetually
 ‘ subsist; those who are rich in the learning of
 ‘ the *Vēda*?

317. ‘ A *Brāhmen*, whether learned or igno-
 rant, is a powerful divinity; even as fire is a
 ‘ powerful divinity, whether consecrated or
 ‘ popular.

318. ‘ Even in places for burning the dead,
 ‘ the bright fire is undefiled; and, when pre-
 ‘ sented with clarified butter at *subsequent* sacri-
 ‘ fices, blazes again with extreme splendour:

319. ‘ Thus, although *Brāhmens* employ
 ‘ themselves in all sorts of mean occupation,
 ‘ they must invariably be honoured; for they
 ‘ are something transcendently divine.

320. ‘ Of a military man, who raises his
 ‘ arm violently on all occasions against the
 ‘ priestly class, the priest himself shall be the
 ‘ chastiser; since the soldier originally proceed-
 ‘ ed from the *Brāhmen*.

321. ‘ From the waters arose fire; from the
 ‘ priest, the soldier; from stone, iron: their all-
 ‘ penetrating force is ineffectual in the places,
 ‘ whence they respectively sprang.

322. ‘ The military class cannot prosper

‘ without the sacerdotal, nor can the sacerdotal
 ‘ be raised without the military: both classes, by
 ‘ cordial union, are exalted in this world and
 ‘ in the next.

323. ‘ *SHOULD* the king *be near his end through*
 ‘ *some incurable disease*, he must bestow on the
 ‘ priests all his riches accumulated from legal
 ‘ fines; and, having duly committed his king-
 ‘ dom to his son, let him seek death in battle, *or*,
 ‘ *if there be no war, by abstaining from food.*

324. ‘ Thus conducting himself, *and ever*
 ‘ firm in discharging his royal duties, let the king
 ‘ employ all his ministers in acts beneficial to his
 ‘ people.

325. ‘ These rules for the conduct of a mi-
 ‘ litary man having been propounded, let man-
 ‘ kind next hear the rules for the commercial
 ‘ and servile classes in due order.

326. ‘ *LET* the *Vaisya*, having been girt with
 ‘ his proper sacrificial thread, and having mar-
 ‘ ried an equal wife, be always attentive to his
 ‘ business *of agriculture and trade*, and to that of
 ‘ keeping cattle;

327. ‘ Since the lord of created beings, hav-
 ‘ ing formed herd, and flocks, intrusted them to
 ‘ the care of the *Vaisya*, while he intrusted the
 ‘ whole human species to the *Brábmén* and the
 ‘ *Cshatriya*:

328. ‘ Never must a *Vaisya* be disposed to say,

“ I keep no cattle;” nor, he being willing to
 ‘ keep them, must they by any means be kept
 ‘ by men of another class.

329. ‘ Of gems, pearls, and coral, of iron,
 ‘ of woven cloth, of perfumes and of liquids, let
 ‘ him well know the prices both high and low:

330. ‘ Let him be skilled likewise in *the time*
 ‘ *and manner of sowing seeds*, and in the bad or
 ‘ good qualities of land; let him also perfectly
 ‘ know the correct modes of measuring and
 ‘ weighing,

331. ‘ The excellence or defects of commo-
 ‘ dities, the advantages and disadvantages of
 ‘ different regions, the probable gain or loss on
 ‘ vendible goods, and the means of breeding
 ‘ cattle with large augmentation.

332. ‘ Let him know the just wages of ser-
 ‘ vants, the various dialects of men, the best
 ‘ way of keeping goods, and *whatever else be-*
 ‘ *longs to purchase and sale.*

333. ‘ Let him apply the most vigilant care
 ‘ to augment his wealth by *performing* his duty;
 ‘ and, with great solicitude, let him give nou-
 ‘ rishment to all sentient creatures.

334. ‘ SERVILE attendance on *Bráhmens*
 ‘ learned in the *Véda*, chiefly on such as keep
 ‘ house and are famed for virtue, is of itself the
 ‘ highest duty of a *Súdra*, and leads him to
 ‘ future beatitude:

335. ‘ Pure *in body and mind*, humbly serving
 ‘ the three higher classes, mild in speech, never
 ‘ arrogant, ever seeking refuge in *Bráhmens*
 ‘ principally, he may attain the most eminent
 ‘ class in *another transmigration*.

336. ‘ THIS clear system of duties has been
 ‘ promulgated for the four classes, when they
 ‘ are not in distress for subsistence; now learn
 ‘ in order their several duties in times of neces-
 ‘ sity.’

CHAPTER THE TENTH.

On the mixed Classes; and on Times of Distress.

1. ‘ LET the three twiceborn classes, remaining firm in their several duties, carefully read the *Vēda*; but a *Bráhmēn* must explain it to them, not *a man* of the other two *classes*: this is an established rule.

2. ‘ The *Brábmēn* must know the means of subsistence ordained by law for all the classes, and must declare them to the rest: let himself likewise act in conformity *to law*.

3. ‘ From priority of birth, from superiority of origin, from a more exact knowledge of scripture, and from a distinction in the sacerdotal thread, the *Brábmēn* is the lord of all classes.

4. ‘ The three twiceborn classes are the sacerdotal, the military, and the commercial; but the fourth, or servile, is onceborn, *that is*, *has no second birth from the gáyatrí, and wears no thread*: nor is there a fifth pure class.

5. ‘ IN all classes they, and they only, who are born, in a direct order, of wives equal in

† class and virgins at the time of marriage, are
 † to be considered as the same in class *with their*
 † *fathers*:

6. † Sons, begotten by twiceborn men, on
 † women of the class next immediately below
 † them, wise legislators call similar, *not the same*,
 † in class *with their parents*, because they are
 † degraded, *to a middle rank between both*, by the
 † lowness of their mothers; *they are named in*
 † *order, Múrdhábhishta, Máhishya, and Ca-*
 † *rana, or Cáyast'ha; and their several employ-*
 † *ments are teaching military exercises; musick,*
 † *astronomy, and keeping herds; and attendance on*
 † *princes.*

7. † Such is the primeval rule for the sons
 † of women one degree lower *than their husbands*:
 † for the sons of women two or three degrees
 † lower, let this rule of law be known.

8. † From a *Brábmén*, on a wife of the *Vaisya*
 † class, is born a son called *Ambast'ha*, or
 † *Vaidya*, on a *Súdra* wife a *Nisháda*, named
 † also *Párasava*:

9. † From a *Cshatriya*, on a wife of the *Súdra*
 † class, springs a creature, called *Ugra*, with a
 † nature partly warlike and partly servile, fero-
 † cious in his manners, cruel in his acts.

10. † The sons of a *Brábmén* by women of
 † three lower classes, of a *Cshatriya* by women of
 † two, and of a *Vaisya* by one lower class, are

‘ called *apasadāb*, or degraded *below their fathers*.

11. ‘ From a *Cṣhatriya*, by a *Brāhmenī* wife, ‘ springs a *Sūta* by birth; from a *Vaiśya*, by a ‘ military or sacerdotal wife, spring a *Māgadha* ‘ and a *Vaidēha*.

12. ‘ From a *Sūdra*, on women of the commercial, military, and priestly classes, are born ‘ sons of a mixed breed, called *A'yógava*, *Cṣhattri*, and *Chandāla*, the lowest of mortals.

13. ‘ As the *Ambasht'ba* and *Ugra*, born in ‘ a direct order with one class between *those of their parents*, are considered in law, so are the ‘ *Cṣhattri* and the *Vaidēba*, born in an inverse ‘ order *with one intermediate class*; and all four ‘ *may be touched without impurity*.

14. ‘ Those sons of the twiceborn, who are ‘ begotten on women without an interval (*Antara*) between the classes mentioned in order, ‘ the wife called *Anantaras*, giving them a *distinct* name from the lower degree of their ‘ mothers.

15. ‘ From a *Brāhmen*, by a girl of the *Ugra* ‘ tribe, is born an *A'vrīta*; by one of the *Ambast'ba* tribe, an *A'bhīra*; by one of the *A'yógava* tribe, a *Dhigvana*.

16. ‘ The *A'yógava*, the *Cṣhattri*, and the ‘ *Chandāla*, the lowest of men, spring from a ‘ *Sūdra* in an inverse order of the classes, and

‘ are, therefore, all three excluded from the performance of obsequies to their ancestors:

17. ‘ From a *Vaisya* the *Mágadha* and *Vaidéba*, from a *Cshatriya* the *Súta* only, are born in an inverse order; and they are three other sons excluded from funeral rites to their fathers.

18. ‘ The son of a *Nisháda*, by a woman of the *Súdra* class, is by tribe a *Puccasa*; but the son of a *Súdra* by a *Nishádi* woman, is named *Cuccutaca*.

19. ‘ One, born of a *Cshattri* by an *Ugrá*, is called *Swapáca*; and one, begotten by a *Vaidéha* on an *Ambasthi* wife, is called *Véna*.

20. ‘ Those, whom the twiceborn beget on women of equal classes, but who perform not the proper ceremonies of assuming the thread, and the like, people denominate *Vrátyas*, or excluded from the *gáyatri*.

21. ‘ From such an outcast *Bráhmen* springs a son of a sinful nature, who in different countries is named a *Bhúrjacantaca*, an *Avantya*, a *Vátadhána*, a *Pushpadha*, and a *Saic’ha*:

22. ‘ From such an outcast *Cshatriya* comes a son called a *J’halla*, a *Malla*, a *Nich’bivi*, a *Nata*, a *Carana*, a *C’hasa*, and a *Dravira*:

23. ‘ From such an outcast *Vaisya* is born a son called *Sudhanwan*, *Chárya*, *Cárusa*, *Vijanman*, *Maitra*, and *Satwata*.

24. ‘ By intermixtures of the classes, by their

‘ marriages with women who ought not to be
 ‘ married, and by their omission of prescribed
 ‘ duties, impure classes have been formed.

25. ‘ Those men of mingled births, who
 ‘ were born in the inverse order of classes, and
 ‘ who intermarry among themselves, I will now
 ‘ compendiously describe.

26. ‘ The *Sûta*, the *Vaidêba*, and the *Chan-*
 ‘ *dâla*, that lowest of mortals, the *Mâgadha*, the
 ‘ *Cshattrî* by tribe, and the *Ayôgava*,

27. ‘ These six beget similar sons on women
 ‘ of their own classes, or on women of the same
 ‘ class with their mothers; and they produce
 ‘ the like from women of the two highest
 ‘ classes, and of the lowest:

28. ‘ As a twiceborn son may spring from a
 ‘ *Brâhmen* by women of two classes out of
 ‘ three, a similar son, when there is no interval,
 ‘ and an equal son from a woman of his own
 ‘ class, it is thus in the case of the low tribes
 ‘ in order.

29. ‘ Those six beget, on women of their
 ‘ own tribes, reciprocally, very many despic-
 ‘ ble and abject races even more foul than their
 ‘ begetters.

30. ‘ Even as a *Sûdra* begets, on a *Brâhmen*
 ‘ woman, a son more vile than himself, thus
 ‘ any other low man begets, on woman of the
 ‘ four classes, a son yet lower.

31. ' The six low classes, marrying inversely,
 ' beget fifteen yet lower tribes, the base pro-
 ' ducing still baser; *and in a direct order they*
 ' *produce fifteen more.*

32. ' A *Dasyu*, or outcast of any pure class,
 ' begets on an *A'yógavi* woman a *Sairindhra*,
 ' who should know how to attend and to dress
 ' his master; though not a slave, he must live
 ' by slavish work, and may also gain subsistence
 ' by catching wild beasts in toils:

33. ' A *Vaidéha* begets on her a sweetvoiced
 ' *Maitréyaca*, who, ringing a bell at the ap-
 ' pearance of dawn, continually praises great
 ' men:

34. ' A *Nisháda* begets on her a *Márgava*,
 ' or *Dása*, who subsists by his labour in boats,
 ' and is named *Cariverta* by those, who dwell in
 ' *A'ryáverta*, or the land of the venerable.

35. ' Those three of a base tribe are severally
 ' begotten on *A'yógavi* women, who wear the
 ' clothes of the deceased and eat reprehensible
 ' food.

36. ' From a *Nisháda* springs *by a woman of*
 ' *the Vaidéha tribe*, a *Carávara*, who cuts lea-
 ' ther, and from a *Vaidéha* spring *by women of*
 ' *the Carávara and Nisháda casts*, an *Andhra*
 ' and a *Méda*, who must live without the town.

37. ' From a *Chandála*, by a *Vaidébī* woman,
 ' comes a *Pándusōpaca*, who works with cane

‘ and reeds; and from a *Nishāda*, an *Abindica*,
 ‘ who acts as a jailor.

38. ‘ From a *Chandāla*, by a *Puccasī* woman,
 ‘ is born a *Sópāca*, who lives by punishing criminals
 ‘ condemned by the king, a sinful wretch
 ‘ ever despised by the virtuous.

39. ‘ A *Nishādī* woman, by a *Chandāla*, produces
 ‘ a son called *Antyavāsya*, employed in
 ‘ places for burning the dead, contemned even
 ‘ by the contemptible.

40. ‘ These, among various mixed classes,
 ‘ have been described by their several fathers
 ‘ and mothers; and, whether concealed or open,
 ‘ they may be known by their occupations.

41. ‘ Six sons, *three* begotten on women of
 ‘ the same class, and *three* on women of lower
 ‘ classes, must perform the duties of twiceborn
 ‘ men; but those, who are *born in an inverse*
 ‘ *order, and* called lowborn, are equal, in respect
 ‘ of duty, to mere *Sūdras*.

42. ‘ By the force of extreme devotion and
 ‘ of exalted fathers, all of them may rise *in time*
 ‘ to high birth, as *by the reverse* they may sink
 ‘ to a lower state, in every age among mortals
 ‘ in this inferiour world.

43. ‘ THE following races of *Cshatriyas*, by
 ‘ their omission of holy rites and by seeing no
 ‘ *Bráhmens*, have gradually sunk among men to
 ‘ the lowest of the four classes;

44. ‘ *Paund’racas*, *Odras*, and *Draviras*;
 ‘ *Cámbójas*, *Yavanas*, and *Sacas*; *Páradas*,
 ‘ *Pablavas*, *Cbínas*, *Girátas*, *Deradas*, and
 ‘ *C’hasas*.

45. ‘ All those tribes of men, who sprang
 ‘ from the mouth, the arm, the thigh, and the
 ‘ foot of BRAHMA’, but who became outcasts by
 ‘ having neglected their duties, are called *Dasyus*,
 ‘ or *plunderers*, whether they speak the language
 ‘ of *Mlêchch’bas*, or that of *A’ryas*.

46. ‘ THOSE sons of the twiceborn, who are
 ‘ said to be degraded, and who are considered as
 ‘ lowborn, shall subsist only by such employ-
 ‘ ments, as the twiceborn despise.

47. ‘ *Sútas* must live by managing horses and
 ‘ by driving cars; *Ambasht’bas*, by curing dis-
 ‘ orders; *Vaidébas*, by waiting on women; *Má-
 ‘ gadbas*, by travelling with merchandize;

48. ‘ *Nishádas*, by catching fish; an *A’yógava*,
 ‘ by the work of a carpenter; a *Méda*, an *An-
 ‘ dbra*, and (the sons of a *Brábmén* by wives of
 ‘ the *Vaidéba* and *Ugra* classes, respectively called)
 ‘ a *Chunchu* and a *Madgu*, by slaying beasts of
 ‘ the forest;

49. ‘ A *Gshattri*, an *Ugra*, and a *Puccasa*,
 ‘ by killing or confining such animals as live in
 ‘ holes; *Dbigvanas*, by selling leather; *Vénas*,
 ‘ by striking musical instruments:

50. ' Near large publick trees, in places for
 ' burning the dead, on mountains, and in
 ' groves, let those tribes dwell, generally known,
 ' and engaged in their several works.

51. ' THE abode of a *Chandála* and a *Swa-*
 ' *páca* must be out of the town; they must not
 ' have the use of entire vessels; their sole wealth
 ' must be dogs and asses:

52. ' Their clothes must be the mantles of
 ' the deceased; their dishes for food, broken
 ' pots; their ornaments, rusty iron; continually
 ' must they roam from place to place:

53. ' Let no man, who regards his duty re-
 ' ligious and civil, hold any intercourse with
 ' them; let their transactions be confined to
 ' themselves, and their marriages only between
 ' equals:

54. ' Let food be given to them in pot-
 ' sherds, but not by the hands of the giver;
 ' and let them not walk by night in cities or
 ' towns:

55. ' By day they may walk about for the
 ' purpose of work, distinguished by the king's
 ' badges; and they shall carry out the corpse of
 ' every one, who dies without kindred: such
 ' is the fixed rule.

56. ' They shall always kill those, who are
 ' to be slain by the sentence of the law, and by
 ' the royal warrant; and let them take the

‘ clothes of the slain, their beds, and their ornaments.

57. ‘ HIM, who was born of a sinful mother, *and consequently* in a low class. but is not openly known, who, though worthless in truth, bears the semblance of a worthy man, let people discover by his acts:

58. ‘ Want of virtuous dignity, harshness of speech, cruelty, and habitual neglect of prescribed duties, betray in this world the son of a criminal mother.

59. ‘ Whether a man of debased birth assume the character of his father or of his mother, he can at no time conceal his origin:

60. ‘ He, whose family had been exalted, but whose parents were criminal in marrying, has a base nature, according as the offence of *his mother* was great or small.

61. ‘ In whatever country such men are born, as destroy the purity of the four classes, that country soon perishes together with the natives of it.

62. ‘ Desertion of life, without reward, for the sake of preserving a priest or a cow, a woman or a child, may cause the beatitude of those baseborn tribes.

63. Avoiding all injury to *animated beings*, veracity, abstinence from theft, *and from unjust seizure of property*, cleanliness, and command

‘ over the bodily organs, form the compendious
 ‘ system of duty, which MENU has ordained for
 ‘ the four classes.

64. ‘ SHOULD the tribe sprung from a *Bráhm*-
 ‘ *men*, by a *Súdra* woman, produce a *succession of*
 ‘ *children* by the marriages of its women with
 ‘ other *Bráhmens*, the low tribe shall be raised
 ‘ to the highest in the seventh generation.

65. ‘ As the son of a *Súdra* may *thus* attain
 ‘ the rank of a *Bráhmen*, and as the son of a
 ‘ *Bráhmen* may sink to a level with *Súdras*, even
 ‘ so must it be with him, who springs from a
 ‘ *Cshatriya*; even so with him, who was born
 ‘ of a *Vaisya*.

66. ‘ IF there be a doubt, as to the preference
 ‘ between him, who was begotten by a *Bráhmen*
 ‘ for his pleasure, *but not in wedlock*, on a *Súdra*
 ‘ woman, and him, who was begotten by a
 ‘ *Súdra* on a *Bráhment*,

67. ‘ Thus is it removed: he, who was be-
 ‘ gotten by an exalted man on a base woman,
 ‘ may by his good acts become respectable; but
 ‘ he, who was begotten on an exalted woman
 ‘ by a base man, must himself continue base :

68. ‘ Neither of the two (as the law is fixed).
 ‘ shall be girt with a sacred string; not the for-
 ‘ mer, because his mother was low; nor the
 ‘ second, because the order of the classes was in-
 ‘ verted.

69. ‘ As good grain, springing from good
 ‘ soil, is in all respects excellent, thus a man,
 ‘ springing from a respectable father by a respect-
 ‘ able mother, has a claim to the whole institu-
 ‘ tion of the twice born.

70. ‘ Some sages give a preference to the
 ‘ grain; others to the field; and others consider
 ‘ both field and grain; on this point the decision
 ‘ follows:

71. ‘ Grain, cast into bad ground, wholly
 ‘ perishes, and a good field with no grain sown
 ‘ in it, is a mere heap of clods;

72. ‘ But since, by the virtue of eminent fa-
 ‘ thers, even the sons of wild animals, *as Rîsh-*
 ‘ *yasringa, and others,* have been transformed
 ‘ into holy men revered and extolled, the pa-
 ‘ ternal side, therefore, prevails.

73. ‘ BRAHMA’ himself, having compared a
 ‘ *Súdra*, who performs the duties of the twice-
 ‘ born, with a twiceborn man, who does the
 ‘ acts of a *Súdra*, said: “ Those two are neither
 ‘ equal nor unequal,” *that is, they are neither*
 ‘ *equal in rank, nor unequal in bad conduct.*

74. ‘ LET such *Bráhmens* as are intent on the
 ‘ means of attaining the supreme godhead, and
 ‘ firm in their own duties, completely perform
 ‘ in order, the six following acts:

75. ‘ Reading the *Védas*, and teaching *others*
 ‘ to read them, sacrificing, and assisting *others* to

‘ sacrifice, giving *to the poor, if themselves have enough*, and accepting gifts *from the virtuous, if themselves are poor*, are the six prescribed acts of the firstborn class;

76. ‘ But, among those six acts of a *Brábmén*, three are his *means of subsistence*; assisting to sacrifice, teaching the *Veaas*, and receiving gifts from a purehanded giver.

77. ‘ Three acts of duty cease with the *Brábmén*, and belong not to the *Cshatriya*; teaching the *Védas*, officiating at a sacrifice, and, thirdly, receiving presents:

78. ‘ Those *three* are also (by the fixed rule of law) forbidden to the *Vaisya*; since MENU, the lord of all men, prescribed not those acts to the two *classes, military and commercial*.

79. ‘ The means of subsistence, peculiar to the *Cshatriya*, are bearing arms, either held for striking or missile; to the *Vaisya*, merchandize, attending on cattle, and agriculture: but *with a view to the next life* the duties of both are almsgiving, reading, sacrificing.

80. ‘ Among the several occupations *for gaining a livelihood* the most commendable respectively for the sacerdotal, military, and mercantile classes, are teaching the *Véda*, defending the people, and commerce or keeping herds and flocks.

81. ‘ Yet a *Brábmén*, unable to subsist by his

‘ duties just mentioned, may live by the duty of
 ‘ a soldier; for that is the next in rank.

82. ‘ If it be asked, how he must live, should
 ‘ he be unable to get a subsistence by either of
 ‘ those employments; *the answer is*, he may
 ‘ subsist as a mercantile man, applying himself
 ‘ *in person* to tillage and attendance on cattle:

83. ‘ But a *Bráhmén* and a *Cshatriya*, obliged
 ‘ to subsist by the acts of a *Vaisya*, must avoid
 ‘ with care, *if they can live by keeping herds*, the
 ‘ business of tillage, which gives great pain to
 ‘ *sentient creatures*, and is dependant on *the la-*
 ‘ *bour of others, as bulls and so forth*.

84. ‘ Some are of opinion, that agriculture is
 ‘ excellent; but it is a mode of subsistence,
 ‘ which the benevolent greatly blame; for the
 ‘ ironmouthed pieces of wood not only wound
 ‘ the earth, but the creatures dwelling in it.

85. ‘ If, through want of a virtuous live-
 ‘ lihood, they cannot follow laudable occupa-
 ‘ tions, they may then gain a competence of
 ‘ wealth by selling commodities usually sold
 ‘ by merchants, avoiding what ought to be
 ‘ avoided:

86. ‘ They must avoid selling liquids of all
 ‘ sorts, dressed grain, seeds of *tila*, stones, salt,
 ‘ cattle and human creatures;

87. ‘ All woven cloth dyed red, cloth made
 ‘ of *sana*, of *cshumdá* bark, and of wool, even

‘ though not red; fruit, roots, and medicinal
‘ plants;

88. ‘ Water, iron, poison, fleshmeat, the
‘ moonplant, and perfumes of any sort; milk,
‘ honey, buttermilk, clarified butter, oil of *tila*,
‘ wax, sugar, and blades of *cus a-grass*;

89. ‘ All beasts of the forest, *as deer and the*
‘ *like*; ravenous beasts, birds, *and fish*; spi-
‘ rituous liquors, *nili*, or indigo, and *lácshá*,
‘ or lac; and all beasts with uncloven hoofs.

90. ‘ But the *Brábmén* husbandman may at
‘ pleasure sell pure *tila* seeds for the purpose of
‘ holy rites, if he keep them not long *with a hope*
‘ *of more gain*, and shall have produced them
‘ by his own culture:

91. ‘ If he apply seeds of *tila* to any purpose
‘ but food, anointing, and sacred oblations, he
‘ shall be plunged, in the shape of a worm, to-
‘ gether with his parents, into the ordure of dogs.

92. ‘ By selling fleshmeat, *lácshá*, or salt, a
‘ *Brábmén* immediately sinks low; by selling
‘ milk three days, he falls to a level with a
‘ *Súdra*;

93. ‘ And by selling the other forbidden
‘ commodities with his own free will, he assumes
‘ in this world, after seven nights, the nature of
‘ a mere *Vaisya*.

94. ‘ Fluid things may, however, be bartered
‘ for other fluids, but not salt for any thing.

liquid; so may dressed grain for grain undressed, and *tila* seeds for grain in the husk, equal weights or measures being given and taken.

95. ' A MILITARY man, in distress, may subsist by all these means, but at no time must he have recourse to the highest, *or sacerdotal*, function.

96. ' A man of the lowest class, who, through covetousness, lives by the acts of the highest, let the king strip of all his wealth and instantly banish :

97. ' His own office, though defectively performed, is preferable to that of another, though performed completely; for he, who *without necessity* discharges the duties of another class, immediately forfeits his own.

98. ' A MERCANTILE man, unable to subsist by his own duties, may descend even to the servile acts of a *Sûdra*, taking care never to do what ought never to be done; but, when he has gained a competence, let him depart from service.

99. ' A MAN of the fourth class, not finding employment by waiting on the twiceborn, while his wife and son are tormented with hunger, may subsist by handicrafts :

100. ' Let him principally follow those mechanical occupations, *as joinery and masonry*, or

‘ those various practical arts, *as painting and*
 ‘ *writing*, by following which, he may serve the
 ‘ twiceborn.

101. ‘ SHOULD a *Bráhmén*, afflicted and pin-
 ‘ ing through want of food, choose rather to re-
 ‘ main fixed in the path of his own duty, than
 ‘ to adopt the practice of *Vaishyas*, let him act in
 ‘ this manner:

102. ‘ The *Bráhmén*, having fallen into dis-
 ‘ tress, may receive gifts from any person what-
 ‘ ever; for by no sacred rule can it be shown,
 ‘ that absolute purity can be sullied.

103. ‘ From interpreting the *Véda*, from offi-
 ‘ ciating at sacrifices, or from taking presents,
 ‘ though in modes generally disapproved, no sin
 ‘ is committed by priests *in distress*; for they are
 ‘ pure as fire or water.

104. ‘ He, who receives food, when his life
 ‘ could not otherwise be sustained, from any
 ‘ man whatever, is no more tainted by sin, than
 ‘ the subtil ether by mud:

105. ‘ AJIGARTA, dying with hunger, was
 ‘ going to destroy his own son (*named S’UNAH-*
 ‘ *S’EP’HA*) by selling him for some cattle; yet he
 ‘ was guilty of no crime, since he only sought a
 ‘ remedy against famishing:

106. ‘ VA’MADEVÁ, who well knew right
 ‘ and wrong, was by no means rendered impure,
 ‘ though desirous, when oppressed *with hunger*,

‘ of eating the flesh of dogs for the preservation
 ‘ of his life:

107. ‘ BĤARADWA’JA, eminent in devotion,
 ‘ when he and his son were almost starved in a
 ‘ dreary forest, accepted several cows from the
 ‘ carpenter VRĪDHU:

108. ‘ VISWA’MITRA too, than whom none
 ‘ better knew the distinctions between virtue
 ‘ and vice, resolved, when he was perishing with
 ‘ hunger, to eat the haunch of a dog, which he
 ‘ had received from a *Chandāla*.

109. ‘ Among *the* acts generally disapproved,
 ‘ *namely*, accepting presents from low men, assist-
 ‘ ing *them* to sacrifice, and explaining the scripture
 ‘ to *them*, the receipt of presents is the meanest
 ‘ *in this world*, and the most blamed in a *Brāh-*
 ‘ *men* after his present life;

110. ‘ Because assisting to sacrifice and ex-
 ‘ plaining the scripture are two acts always per-
 ‘ formed for those, whose minds have been im-
 ‘ proved *by the sacred initiation*; but gifts are
 ‘ also received from a servile man of the lowest
 ‘ class.

111. ‘ The guilt, incurred by assisting *low*
 ‘ *men* to sacrifice and by teaching *them* the
 ‘ scripture, is removed by repetitions of the
 ‘ *gāyatrī* and oblations to fire; but that, incurred
 ‘ by accepting gifts *from them*, is expiated only

‘ by abandoning the gifts and by rigorous devotion.

112. ‘ It were better for a *Brábmén*, who could not maintain himself, to glean ears and grains after harvest from *the field of* any person whatever: gleaning whole ears would be better than accepting a present, and picking up single grains would be still more laudable.

113. ‘ *Brábméns*, who keep house, and are in want of any metals *except gold and silver*, or of other articles *for good uses*, may ask the king for them, if he be of the military class; but a king, *known to be avaricious and unwilling to give*, must not be solicited.

114. ‘ The foremost, *in order*, of these things may be received more innocently than that, which follows it: a field untilled, a tilled field, cows, goats, sheep, precious metals or gems, new grain, dressed grain.

115. ‘ THERE are seven virtuous means of acquiring property; succession, occupancy or donation, and purchase or exchange, *which are allowed to all classes*; conquest, *which is peculiar to the military class*; lending at interest, husbandry or commerce, *which belong to the mercantile class*; and acceptance of presents, *by the sacerdotal class*, from respectable men.

116. ‘ Learning, *except that contained in the*

‘ *scriptures, art, as mixing perfumes and the*
 ‘ *like, work for wages, menial service, attend-*
 ‘ *ance on cattle, traffick, agriculture, content*
 ‘ *with little, alms, and receiving high interest*
 ‘ *on money, are ten modes of subsistence in times*
 ‘ *of distress.*

117. ‘ Neither a priest nor a military man,
 ‘ *though distressed*, must receive interest on loans;
 ‘ but each of them, if he please, may pay *the*
 ‘ *small interest permitted by law, on borrowing*
 ‘ *for some pious use, to the sinful man, who de-*
 ‘ *mands it.*

118. ‘ A MILITARY king, who takes even a
 ‘ *fourth part of the crops of his realm* at a time
 ‘ of urgent necessity, *as of war or invasion*, and
 ‘ protects his people to the utmost of his power,
 ‘ commits no sin:

119. ‘ His peculiar duty is conquest, and he
 ‘ must not recede from battle; so that, while he
 ‘ defends by his arms the merchant and hus-
 ‘ bandman, he may levy the legal tax *as the*
 ‘ *price of protection.*

120. ‘ The tax on the mercantile class, *which*
 ‘ *in times of prosperity must be only a twelfth part*
 ‘ *of their crops, and a fiftieth of their personal*
 ‘ *profits*, may be an eighth of their crops *in a*
 ‘ *time of distress, or a sixth, which is the medium,*
 ‘ *or even a fourth in great publick adversity; but*
 ‘ *a twentieth of their gains on money, and*

‘ other moveables, is the highest *tax*: serving
 ‘ men, artifans, and mechanicks must assist by
 ‘ their labour, *but at no time pay taxes*.

121. ‘ IF a *Sûdra* want a subsistence *and*
 ‘ cannot attend a priest, he may serve a *Csha-*
 ‘ *triya*; or, *if he cannot wait on a soldier by birth*,
 ‘ he may gain his livelihood by serving an opu-
 ‘ lent *Vaisya*.

122. ‘ To him, who serves *Brâhmens* with a
 ‘ view to a heavenly reward, or even with a
 ‘ view to both *this life and the next*, the union
 ‘ of the word *Brâhmen* with his *name of servant*
 ‘ will assuredly bring success.

123. ‘ Attendance on *Brâhmens* is pro-
 ‘ nounced the best work of a *Sûdra*: whatever
 ‘ else he may perform will comparatively avail
 ‘ him nothing.

124. ‘ They must allot him a fit mainte-
 ‘ nance according to their own circumstances,
 ‘ after considering his ability, his exertions, and
 ‘ the number of those, whom he must provide
 ‘ with nourishment:

125. ‘ What remains of their dressed rice
 ‘ must be given to him; and apparel which
 ‘ they have worn, and the refuse of their grain,
 ‘ and their old household furniture.

126. ‘ THERE is no guilt in a man of the
 ‘ servile class, *who eats leeks and other forbidden*
 ‘ *vegetables*: he must not have the sacred invet-

‘ titude: he has no business with *the* duty of
 ‘ making oblations to fire and the like; but there is
 ‘ no prohibition against *his* offering dressed grain
 ‘ as a sacrifice, by way of discharging his own
 ‘ duty.

127. ‘ Even *Súdras*, who are anxious to
 ‘ perform their entire duty, and, knowing what
 ‘ they should perform, imitate the practice of
 ‘ good men in the household sacraments, but
 ‘ without any holy text, *except those containing*
 ‘ *praise and salutation*, are so far from sinning,
 ‘ that they acquire just applause:

128. ‘ As a *Súdra*, without injuring another
 ‘ man, performs the *lawful* acts of the twice-
 ‘ born, even thus, without being censured, he
 ‘ gains exaltation in this world and in the
 ‘ next.

129. ‘ No *superfluous* collection of wealth
 ‘ must be made by a *Súdra*, even though he
 ‘ has power to make it, since a servile man,
 ‘ who has amassed riches, *becomes proud, and,*
 ‘ *by his insolence or neglect*, gives pain even to
 ‘ *Brahmens*.

130. ‘ Such, as have been fully declared,
 ‘ are the several duties of the four classes in dis-
 ‘ tress for subsistence; and, if they perform
 ‘ them exactly, they shall attain the highest
 ‘ beatitude.

131. 'Thus has been propounded the system of duties, religious and civil, ordained for all classes: I next will declare the pure law of expiation for sin.'

CHAPTER THE ELEVENTH.

On Penance and Expiation.

1. ' HIM, who intends to marry for the
' sake of having issue; him, who wishes to
' make a sacrifice; him, who travels; him, who
' has given all his wealth at a sacred rite; him,
' who desires to maintain his preceptor, his
' father, or his mother; him, who needs a
' maintenance for himself, when he first reads the
' *Védas*, and him, who is afflicted with illness;

2. ' These nine *Bráhmens* let mankind con-
' sider as virtuous mendicants, called *śnátacas*;
' and, to relieve their wants, let gifts of *cattle or*
' *gold* be presented to them in proportion to
' their learning :

3. ' To these most excellent *Bráhmens* must
' rice also be given with holy presents *at obla-*
' *tions to fire and within the consecrated circle*;
' but the dressed rice, which others are to re-
' ceive, must be delivered on the outside of the
' sacred hearth: *gold and the like may be given*
' *any where.*

4. ' On such *Bráhmens*, as well know the

‘ *Vēda*, let the king bestow, as it becomes him,
 ‘ jewels of all sorts, and the solemn reward for
 ‘ officiating at the sacrifice.

5. ‘ HE, who has a wife, and, having beg-
 ‘ ged money *to defray his nuptial expences*, mar-
 ‘ ries another woman, shall have no advantage
 ‘ but sensual enjoyment: the offspring belongs
 ‘ to the bestower of the gift.

6. ‘ LET every man, according to his ability,
 ‘ give wealth to *Brāhmens* detached from the
 ‘ world and learned in scripture: such a giver
 ‘ shall attain heaven after this life.

7. ‘ HE alone is worthy to drink the juice of
 ‘ the moonplant, who keeps a provision of
 ‘ grain sufficient to supply those, whom the law
 ‘ commands him to nourish, for the term of
 ‘ three years or more;

8. ‘ But a twiceborn man, who keeps a less
 ‘ provision of grain, yet presumes to taste the
 ‘ juice of the moonplant, shall gather no fruit
 ‘ from that sacrament, even though he taste it at
 ‘ the first, *or solemn, much less at any occasional,*
 ‘ ceremony.

9. ‘ HE, who bestows gifts on strangers *with*
 ‘ *a view to worldly fame*, while he suffers his fa-
 ‘ mily to live in distress, though he has power
 ‘ *to support them*, touches his lips with honey,
 ‘ but swallows poison; such virtue is counter-
 ‘ feit:

10. ' Even what he does for the sake of his
 ' future spiritual body, to the injury of those,
 ' whom he is bound to maintain, shall bring
 ' him ultimate misery both in this life and in
 ' the next.

11. ' SHOULD a sacrifice, performed by any
 ' twiceborn sacrificer, and by a *Bráhm n* espe-
 ' cially, be imperfect from the want of some in-
 ' gredient, during the reign of a prince, who
 ' knows the law,

12. ' Let him take that article, for the com-
 ' pletion of the sacrifice, from the house of any
 ' *Vaisya*, who possesses considerable herds, but
 ' neither sacrifices, nor drinks the juice of the
 ' moonplant :

13. ' If such a *Vaisya* be not near, he may
 ' take two or three such necessary articles at
 ' pleasure from the house of a *Súdra*; since a
 ' *Súdra* has no business with solemn rites.

14. ' Even from the house of a *Bráhmén* or
 ' a *Cshatriya*, who possesses a hundred cows,
 ' but has no consecrated fire, or a thousand
 ' cows, but performs no sacrifice *with the moon-*
 ' *plant*, let a priest without scruple take *the*
 ' *articles wanted*.

15. ' From another *Bráhmén*. who continu-
 ' ally receives presents but never gives, let him
 ' take such ingredients of the sacrifice, if not

‘ bestowed *on request*: so shall his fame be spread
 ‘ abroad, and his habits of virtue increase.

16. ‘ Thus, likewise, may a *Bráhmén*, who
 ‘ has not eaten at the time of six meals, *or has*
 ‘ *fasted three whole days*, take at the time of the
 ‘ seventh meal, *or on the fourth morning*, from
 ‘ the man, who behaves basely *by not offering*
 ‘ *him food*, enough to supply him till the mor-
 ‘ row:

17. ‘ He may take it from the floor, where
 ‘ the grain is trodden out of the husk, or from
 ‘ the field, or from the house, or from any
 ‘ place whatever; but, if the owner ask *why he*
 ‘ *takes it*, the cause of the taking must be de-
 ‘ clared.

18. ‘ The wealth of a virtuous *Bráhmén*
 ‘ must at no time be seized by a *Gshatriya*;
 ‘ but, having no other means *to complete a sacri-*
 ‘ *fice*, he may take the goods of any man, who
 ‘ acts wickedly, and of any, who performs not
 ‘ his religious duties:

19. ‘ He, who takes property from the bad
 ‘ *for the purpose before-mentioned*, and bestows it
 ‘ on the good, transforms himself into a boat,
 ‘ and carries both *the good and the bad over a sea*
 ‘ *of calamities*.

20. ‘ Wealth, possessed by men for the per-
 ‘ formance of sacrifices, the wise call the pro-

‘ perty of the gods ; but the wealth of men,
 ‘ who perform no sacrifice, they consider as the
 ‘ property of demons.

21. ‘ Let no pious king fine the man, *who*
 ‘ *takes by stealth or by force what he wants to*
 ‘ *make a sacrifice perfect* ; since it is the king’s
 ‘ folly, that causes the hunger or wants of a
 ‘ *Bráhmén* :

22. ‘ Having reckoned up the persons, whom
 ‘ the *Bráhmén* is obliged to support, having as-
 ‘ certained his divine knowledge and moral
 ‘ conduct, let the king allow him a suitable
 ‘ maintenance from his own household ;

23. ‘ And, having appointed him a mainte-
 ‘ nance, let the king protect him on all sides ;
 ‘ for he gains from the *Bráhmén*, whom he pro-
 ‘ tects, a sixth part of *the reward for his virtue*.

24. ‘ LET no *Bráhmén* ever beg a gift from
 ‘ a *Súdra* ; for, if he perform a sacrifice after
 ‘ such begging, he shall, in the next life, be
 ‘ born a *Chandála*.

25. ‘ The *Bráhmén*, who begs any articles
 ‘ for a sacrifice, and disposes not of them all for
 ‘ that purpose, shall become a kite or a crow
 ‘ for a hundred years.

26. ‘ Any evilhearted wretch, who, through
 ‘ covetousness, shall seize the property of the
 ‘ gods or of *Bráhmén*s, shall feed in another
 ‘ world on the orts of vultures.

27. ' THE sacrifice *Vaiśvánari* must be constantly performed on the first day of the new year, or on the new moon of *Chaitra*, as an expiation for having omitted *through mere forgetfulness* the appointed sacrifices of cattle and the rites of the moonplant :

28. ' But a twiceborn man, who, without necessity, does an act allowed only in a case of necessity, reaps no fruit from it hereafter ; thus has it been decided.

29. ' By the *Viśvédévas*, by the *Sádhya*s, and by eminent *Rishis* of the sacerdotal class, the substitute was adopted for the principal act, when they were apprehensive of dying in times of eminent peril ;

30. ' But no reward is prepared in a future state for that illminded man, who, when able to perform the principal sacrifice, has recourse to the substitute.

31. ' A PRIEST, who well knows the law, needs not complain to the king of any grievous injury ; since, even by his own power, he may chastise those, who injure him :

32. ' His own power, *which depends on himself alone*, is mightier than the royal power, *which depends on other men* : by his own might, therefore, may a *Bráhmen* coerce his foes.

33. ' He may use, without hesitation, the powerful charms revealed to *ATHARVAN*, and

‘ *by him* to *ANGIRAS*; for speech is the weapon
 ‘ of a *Brábhmen*: with that he may destroy his
 ‘ oppressors.

34. ‘ A soldier may avert danger from him-
 ‘ self by the strength of his arm; a merchant
 ‘ and a mechanick, by their property; but the
 ‘ chief of the twiceborn, by holy texts and ob-
 ‘ lations to fire.

35. ‘ A priest, who performs his duties, who
 ‘ justly corrects *his children and pupils*, who ad-
 ‘ vises expiations for sin, and who loves all ani-
 ‘ mated creatures, is truly called a *Brábhmen*: to
 ‘ him let no man say any thing unpropitious,
 ‘ nor use any offensive language.

36. ‘ Let not a girl, nor a young woman
 ‘ *married or unmarried*, nor a man with little
 ‘ learning, nor a dunce, perform an oblation to
 ‘ fire; nor a man diseased, nor one uninvested
 ‘ *with the sacrificial string*;

37. ‘ Since any of those persons, who make
 ‘ such an oblation, shall fall into a region of
 ‘ torture, together with him, who suffers his
 ‘ hearth to be used: he alone, who perfectly
 ‘ knows the sacred ordinances, and has read all
 ‘ the *Védas*, must officiate at an oblation to holy
 ‘ fire.

38. ‘ A *Brábhmen* with abundant wealth, who
 ‘ presents not the priest, that hallows his fire,
 ‘ with a horse consecrated to *PRAJA’PATI*,

‘ becomes equal to one who has no fire hal-
 ‘ lowed.

39. ‘ Let him, who believes the scripture,
 ‘ and keeps his organs in subjection, perform
 ‘ all other pious acts; but never in this world
 ‘ let him offer a sacrifice with trifling gifts to
 ‘ the officiating priest:’

40. ‘ The organs of sense and action, repu-
 ‘ tation *in this life*, a heavenly mansion *in the*
 ‘ *next*, life *itself*, a great name *after death*, chil-
 ‘ dren, *and* cattle, are all destroyed by a sacri-
 ‘ fice offered with trifling presents: let no man,
 ‘ therefore, sacrifice without liberal gifts.

41. ‘ THE priest, who keeps a sacred hearth,
 ‘ but voluntarily neglects *the morning and even-*
 ‘ *ing oblations* to his fires, must perform, *in the*
 ‘ *manner to be described*, the penance *chándráyana*
 ‘ for one month; since that *neglect* is equally
 ‘ sinful with the slaughter of a son.

42. ‘ They, who receive property from a
 ‘ *Súdra* for the performance of rites to conse-
 ‘ crated fire, are condemned as ministers of the
 ‘ base, by all such as pronounce texts of the
 ‘ *Véda*:

43. ‘ Of those ignorant priests, who serve
 ‘ the holy fire for the wealth of a *Súdra*, the
 ‘ giver shall always tread on the foreheads, and
 ‘ thus pass over miseries *in the gloom of death*.

44. ‘ EVERY man, who does not an act pre-

‘ scribed, or does an act forbidden, or is guilty
 ‘ of excess *even* in *legal* gratifications of the
 ‘ senses, must perform an expiatory penance.

45. ‘ Some of the learned consider an expia-
 ‘ tion as confined to involuntary sin; but others,
 ‘ from the evidence of the *Vêda*, hold it effec-
 ‘ tual even, in the case of a voluntary offence:

46. ‘ A sin, involuntarily committed, is re-
 ‘ moved by repeating certain texts of the scrip-
 ‘ ture; but a sin committed intentionally,
 ‘ through strange infatuation, by harsh penances
 ‘ of different sorts.

47. ‘ If a twiceborn man, by the will of
 ‘ God in this world, or from his natural birth,
 ‘ have any corporeal mark of an expiable sin
 ‘ committed in this or a former state, he must
 ‘ hold no intercourse with the virtuous, while
 ‘ his penance remains unperformed.

48. ‘ Some evilminded persons, for sins com-
 ‘ mitted in this life, and some for bad actions
 ‘ in a preceding state, suffer a morbid change
 ‘ in their bodies:

49. ‘ A stealer of gold from a *Brâhmen* has
 ‘ whitlows on his nails; a drinker of spirits,
 ‘ black teeth; the slayer of a *Brâhmen*, a ma-
 ‘ rasms; the violator of his *guru's* bed, a de-
 ‘ formity in the generative organs;

50. ‘ A malignant informer, fetid ulcers in
 his nostrils; a false detractor, stinking breath;

‘ a stealer of grain, the defect of some limb ; a
 ‘ mixer of *bad wares with good*, some redundant
 ‘ member;

51. ‘ A stealer of dressed grain, dyspepsia ;
 ‘ a stealer of holy words, *or an unauthorized*
 ‘ *reader of the scriptures*, dumbness ; a stealer
 ‘ of clothes, leprosy ; a horsetealer, lameness ;

52. ‘ The stealer of a lamp, total blindness ;
 ‘ the mischievous extinguisher of it, blindness
 ‘ in one eye ; a delighter in hurting sentient
 ‘ creatures, perpetual illness ; an adulterer,
 ‘ windy swelling in his limbs :

53. ‘ Thus, according to the diversity of ac-
 ‘ tions, are born men despised by the good, stupid,
 ‘ dumb, blind, deaf, and deformed.

54. ‘ Penance, therefore, must invariably be
 ‘ performed for the sake of expiation ; since
 ‘ they, who have not expiated their sins, will
 ‘ again spring to birth with disgraceful marks.

55. ‘ KILLING a *Bráhmén*, drinking for-
 ‘ bidden liquor, stealing gold from a priest,
 ‘ adultery with the wife of a father, natural or
 ‘ spiritual, and associating with such as commit
 ‘ those offences, wise legislators must declare to
 ‘ be crimes in the highest degree, *in respect of*
 ‘ *those after mentioned, but less than incest in a*
 ‘ *direct line, and some others.*

56. ‘ FALSE boasting of a high tribe, malig-
 ‘ nant information, before the king, of a crimi-

* *nal who must suffer death, and falsely accusing a*
 * *spiritual preceptor, are crimes in the second de-*
 * *gree, and nearly equal to killing a Bráhmén.*

57. * *Forgetting the texts of scripture, show-*
 * *ing contempt of the Véda, giving false evi-*
 * *dence without a bad motive, killing a friend*
 * *without malice, eating things prohibited, or,*
 * *from their manifest impurity, unfit to be tasted,*
 * *are six crimes nearly equal to drinking spirits;*
 * *but perjury and homicide require in atrocious cases*
 * *the harshest expiation.*

58. * *To appropriate a thing deposited or*
 * *lent for a time, a human creature, a horse,*
 * *precious metals, a field, a diamond, or any*
 * *other gem, is nearly equal to stealing the gold*
 * *of a Bráhmén.*

59. * *Carnal commerce with sisters by the*
 * *same mother, with little girls, with women*
 * *of the lowest mixed class, or with the wives*
 * *of a friend or of a son, the wife must consider*
 * *as nearly equal to a violation of the paternal*
 * *bed.*

60. * *SLAYING a bull or cow, sacrificing*
 * *what ought not to be sacrificed, adultery, sell-*
 * *ing oneself, deserting a preceptor, a mother,*
 * *a father, or a son, omitting to read the scrip-*
 * *ture, and neglect of the fires prescribed by the*
 * *Dhermasástra only,*

61. * *The marriage of a younger brother bc-*

‘ fore the elder, and that elder’s omission to
 ‘ marry before the younger, giving a daughter
 ‘ to either of them, and officiating at their
 ‘ nuptial sacrifice,

62. ‘ Defiling a damsel, usury, want of per-
 ‘ fect chastity in a student, felling a holy pool
 ‘ or garden, a wife, or a child,

63. ‘ Omitting the sacred investiture, aban-
 ‘ doning a kinsman, teaching the *Vēda* for hire,
 ‘ learning it from a hired teacher, felling com-
 ‘ modities, that ought not to be sold,

64. ‘ Working in mines of any sort, engaging
 ‘ in *dykes, bridges, or other* great mechanical
 ‘ works, spoiling medicinal plants *repeatedly*,
 ‘ subsisting by *the barlotry* of a wife, offering
 ‘ sacrifices and preparing charms to destroy *the*
 ‘ *innocent*,

65. ‘ Cutting down green trees for firewood,
 ‘ performing holy rites with a selfish view
 ‘ merely, and eating prohibited food *once with-*
 ‘ *out a previous design*,

66. ‘ Neglecting to keep up the consecrated
 ‘ fire, stealing *any valuable thing besides gold*,
 ‘ nonpayment of *the three* debts, application to
 ‘ the books of a false religion, and excessive at-
 ‘ tention to musick or dancing,

67. ‘ Stealing grain, base metals, or cattle,
 ‘ familiarity *by the twiceborn* with women, who
 ‘ have drunk inebriating liquor, killing *without*

‘ *malice*, a woman, a *Súdra*, a *Vaishya*, or a *Cshatriya*, and denying a future state of rewards and punishments, are all crimes in the third degree, *but higher or lower according to circumstances*.

68. ‘ GIVING pain to a *Bráhmén*, smelling at any spirituous liquor or any thing *extremely fetid and* unfit to be smelt, cheating, and unnatural practices with a male, are considered as causing a loss of class.

69. ‘ To kill an ass, a horse, a camel, a deer, an elephant, a goat, a sheep, a fish, a snake, or a buffalo, is declared an offence, which degrades the killer to a mixed tribe.

70. ‘ ACCEPTING presents from despicable men, illegal traffick, attendance on a *Súdra* master, and speaking falsehood, must be considered as causes of exclusion from social repasts.

71. ‘ KILLING an insect, small or large, a worm, or a bird, eating what has been brought *in the same basket* with spirituous liquor, stealing fruit, wood, or flowers, and great perturbation of mind on trifling occasions, are offences which cause defilement.

72. ‘ You shall now be completely instructed in those penances, by which all the sins just mentioned are expiable.

73. ‘ If a *Bráhmén* have killed a man of the

• sacerdotal class, *without malice prepense, the*
 • *slayer being far superior to the slain in good qua-*
 • *lities,* he must himself make a hut in a forest
 • and dwell in it twelve whole years, subsisting
 • on alms for the purification of his soul, placing
 • near him, as a token of *his crime, the skull of*
 • *the slain, if he can procure it, or, if not, any hu-*
 • *man skull.* The time of penance for the three
 • lower classes must be twenty four, thirty six, and
 • forty eight, years.

74. • Or, if the slayer be of the military class,
 • he may voluntarily expose himself as a mark
 • to archers, who know *his intention;* or, ac-
 • cording to circumstances, may cast himself head-
 • long thrice, or even till he die, into blazing
 • fire.

75. • Or, if he be a king, and slew a priest
 • without malice or knowledge of his class, he may
 • perform, with presents of great wealth, one of
 • the following sacrifices; an *Aśwamedha*, or a
 • *Swerjit*, or a *Góśava*, or an *Abhijit*, or a *Vif-*
 • *wajit*, or a *Trivrit*, or an *Agnishtut*.

76. • Or, to expiate the guilt of killing a
 • priest without knowing him and without design,
 • the killer may walk on a pilgrimage a hundred
 • *yójanas*, repeating any one of the *Védas*, eating
 • barely enough to sustain life, and keeping his
 • organs in perfect subjection;

77. • Or, if in that case the slayer be unlearned

‘ *but rich*, he may give all his property to some
 ‘ *Bráhmén* learned in the *Véda*, or a sufficiency
 ‘ of wealth for his life, or a house and furniture
 ‘ *to hold while he lives*:

78. ‘ Or, eating only such wild grains as are
 ‘ offered to the gods, he may walk to *the head*
 ‘ of the river *Saraswatî* against the course of
 ‘ the stream; or, subsisting on very little food,
 ‘ he may thrice repeat the whole collection of
 ‘ *Védas*, or the *Rîch*, *Yajush*, and *Sáman*.

79. ‘ Or, his hair being shorn, he may dwell
 ‘ near a town, or on pastureground for cows,
 ‘ or in some holy place, or at the root of a sa-
 ‘ cred tree, taking pleasure in doing good to
 ‘ cows and to *Bráhmén*s;

80. ‘ There, for the preservation of a cow
 ‘ or a *Bráhmén*, let him instantly abandon life;
 ‘ since the preserver of a cow or a *Bráhmén*
 ‘ atones for the crime of killing a priest:

81. ‘ Or, by attempting at least three times
 ‘ forcibly to recover *from robbers* the property
 ‘ of a *Bráhmén*, or by recovering it in one of
 ‘ his attacks, or even by losing his life in the
 ‘ attempt, he atones for his crime.

82. ‘ Thus, continually firm in religious
 ‘ austerity, chaste as a student in the first order,
 ‘ with his mind intent on virtue, he may ex-
 ‘ piate the guilt of *undesignedly* killing a *Bráb-*
 ‘ *men*, after the twelfth year has expired.

83. ‘ Or, if a virtuous Bráhmén unintentionally kill another, who had no good quality, he may atone for his guilt by proclaiming it in an assembly of priests and military men, at the sacrifice of a horse, and by bathing with other Bráhméns at the close of the sacrifice:

84. ‘ Bráhméns are declared to be the basis, and Cshatriyas the summit, of the legal system: he, therefore, expiates his offence by fully proclaiming it in such an assembly.

85. ‘ From his high birth alone, a Bráhmén is an object of veneration even to deities: his declarations to mankind are decisive evidence; and the Vêda itself confers on him that character.

86. ‘ Three at least, who are learned in the Vêda, should be assembled to declare the proper expiation for the sin of a priest, but, for the three other classes, the number must be doubled, tripled, and quadrupled: what they declare shall be an atonement for sinners; since the words of the learned give purity.

87. ‘ Thus a Bráhmén, who has performed one of the preceding expiations, according to the circumstances of the homicide and the characters of the persons killed and killing, with his whole mind fixed on God, purifies his soul, and removes the guilt of slaying a man of his own class:

88. ' He must perform the same penance
 ' for killing an embryo, *the sex of which was*
 ' unknown, but whose parents were *sacerdotal,*
 ' or a military or a commercial man employed
 ' in a sacrifice, or a *Bráhmén* woman, who has
 ' bathed after temporary uncleanness ;

89. ' And *the same* for giving false evidence
 ' *in a cause concerning land or gold or precious*
 ' *commodities,* and for accusing his preceptor un-
 ' justly, and for appropriating a deposit, and
 ' for killing the wife of a priest, *who keeps a*
 ' *consecrated fire,* or for slaying a friend,

90. ' Such is the atonement ordained for
 ' killing a priest *without malice* ; but for killing
 ' a *Bráhmén* with malice prepense, this is no
 ' expiation : *the term of twelve years must be*
 ' *doubled, or, if the case was atrocious, the mur-*
 ' *derer must actually die in flames or in battle.*

91. ' ANY twiceborn man, who has *inten-*
 ' *tionally* drunk spirit of rice, through perverse
 ' delusion of mind, may drink more spirit in
 ' flame, and atone for his offence by severely
 ' burning his body ;

92. ' Or he may drink boiling hot, until he
 ' die, the urine of a cow, or pure water, or
 ' milk, or clarified butter, or juice expressed
 ' from cowdung :

93. ' Or, *if he tasted it unknowingly,* he may
 ' expiate the sin of drinking spirituous liquor,

‘ by eating only some broken rice or grains of
 ‘ *tila*, from which oil has been extracted, once
 ‘ every night for a whole year, wrapped in
 ‘ coarse vesture of hairs from a cow’s tail, or
 ‘ *fitting unclothed in his house*, wearing his locks
 ‘ and beard uncut, and putting out the flag of
 ‘ a tavern-keeper.

94. ‘ Since the spirit of rice is *distilled from*
 ‘ *the Mala*, or filthy refuse, of the grain, and
 ‘ since *Mala* is also a name for sin, let no *Bráh-*
 ‘ *men*, *Cshatriya*, or *Vaisya* drink that spirit.

95. ‘ Inebriating liquor may be considered
 ‘ as of three *principal* sorts; that extracted from
 ‘ dregs of sugar, that extracted from bruised
 ‘ rice, and that extracted from the flowers of
 ‘ the *Madhúca*: as one, so *are* all; they shall
 ‘ not be tasted by the chief of the twiceborn.

96. ‘ Those liquors, and *eight* other sorts,
 ‘ with the flesh of animals, and *Aśava*, the
 ‘ most pernicious beverage, *prepared with nar-*
 ‘ *cotick drugs*, are swallowed at the juncates of
 ‘ *Yacshas*, *Racshasas*, and *Pisáchas*: they shall
 ‘ not, therefore, be tasted by a *Bráhmén*, who
 ‘ feeds on clarified butter offered to gods.

97. ‘ A *Bráhmén*, stupefied by drunkenness,
 ‘ might fall on something very impure, or might
 ‘ even, when intoxicated, pronounce a secret
 ‘ phrase of the *Véda*, or might do some other
 ‘ act, which ought not to be done.

98. ' When the divine spirit, *or the light of*
 ' *holy knowledge*, which has been infused into
 ' his body, has once been sprinkled with any
 ' intoxicating liquor, even his priestly charac-
 ' ter leaves him, and he sinks to the low degree
 ' of a *Sûdra*.

99. ' Thus have been promulgated the va-
 ' rious modes of expiation for drinking spirits:
 ' I will next propound the atonement for steal-
 ' ing the gold of a priest *to the amount of a su-*
 ' *verna*.

100. ' He, who has purloined the gold of a
 ' *Brâhmen*, must hasten to the king, and pro-
 ' claim his offence; adding, "Inflict on me
 ' the punishment due to my crime."

101. ' Then shall the king himself, taking
 ' from him an iron mace, *which the criminal must*
 ' *bear on his shoulder*, strike him with it once;
 ' and by that stroke, *whether he die or be only*
 ' *left as dead*, the thief is released from sin: a
 ' *Brâhmen* by rigid penance alone *can expiate*
 ' *that offence*; another *twiceborn man* may also
 ' perform such a penance at his election.

102. ' The twiceborn man, who desires to
 ' remove by austere devotion the taint caused
 ' by stealing gold, must perform in a forest, co-
 ' vered with a mantle of rough bark, the pe-
 ' nance before ordained for him, who *without*
 ' *malice prepense* has killed a *Brâhmen*.

103. ' By these expiations may the twiceborn
 ' atone for the guilt of stealing gold from a
 ' priest; but the sin of adultery with the wife
 ' of a father, *natural or spiritual*, they must ex-
 ' piate by the following penances.

104. ' HE, who *knowingly and actually* has
 ' defiled the wife of his father, *she being of the*
 ' *same class*, must extend himself on a heated
 ' iron bed, loudly proclaiming his guilt; and,
 ' there embracing the red-hot iron image of a
 ' woman, he shall atone for his crime by death;

105. ' Or, having himself amputated his
 ' penis and scrotum, and holding them in his
 ' fingers, he may walk in a direct path toward
 ' the southwest, or the region of NIRRĪTI, un-
 ' til he fall dead on the ground:

106. ' Or, *if he had mistaken her for another*
woman, he may perform for a whole year,
 ' with intense application of mind, the penance
 ' *brájápatya*, with part of a bed, *or a human*
 ' *bone*, in his hand, wrapped in vesture of coarse
 ' bark, letting his hair and beard grow, and
 ' living in a deserted forest:

107. ' Or, *if she was of a lower class and a*
corrupt woman, he may expiate the sin of vio-
 ' lating the bed of his father, by continuing the
 ' penance *chándrávana* for three months, al-
 ' ways mortifying his body by eating only fo-
 ' rest herbs, or wild grains boiled in water.

108. ' By the preceding penances may sinners of the two higher degrees atone for their guilt; and the less offenders may expiate theirs by the following austerities.

109. ' HE, who has committed the smaller offence of killing a cow *without malice*, must drink for the first month barleycorns boiled soft in water; his head must be shaved entirely; and, covered with the hide of the slain cow, he must fix his abode on her late pasture ground:

110. ' He may eat a moderate quantity of *wild grains*, but without any factitious salt, for the next two months at the time of each fourth repast, *on the evening of every second day*; regularly bathing in the urine of cows, and keeping his members under controul:

111. ' All day he must wait on the herd, and stand quaffing the dust raised by *their hoofs*; at night, having servilely attended and stroked and saluted them, he must surround them with a fence, and sit near to guard them:

112. ' Pure and free from passion, he must stand, while they stand; follow them, when they move together; and lie down by them, when they lie down:

113. ' Should a cow be sick or terrified by

‘ tigers or thieves, or fall, or stick in mud, he
 ‘ must relieve her by all possible means :

114. ‘ In heat, in rain, or in cold, or while
 ‘ the blast furiously rages, let him not seek his
 ‘ own shelter, without first sheltering the cows
 ‘ to the utmost of his power.

115. ‘ Neither in his own house, or field, or
 ‘ floor for treading out grain, nor in those of
 ‘ any other person, let him say a word of a
 ‘ cow, who eats *corn or grass*, or of a calf, who
 ‘ drinks *milk* :

116. ‘ By waiting on a herd, according to
 ‘ these rules, for three months, the slayer of a
 ‘ cow atones for his guilt ;

117. ‘ *But*, his penance being performed,
 ‘ he must give ten cows and a bull, or, his
 ‘ stock, not being so large, must deliver all he
 ‘ possesses, to such as best know the *Vēda*.

118. ‘ THE preceding penances, or that called
 ‘ *chāndráyana*, must be performed for the abso-
 ‘ lution of all twiceborn men, who have com-
 ‘ mitted sins of the lower *or third* degree ; ex-
 ‘ cept those, who have incurred the guilt of an
 ‘ *avacīrna* ;

119. ‘ But he, who has become *Avacīrni*, must
 ‘ sacrifice *a black or a oneeyed afs*, by way of a
 ‘ meatoffering to NIRRĪTĪ, *patronejs of the south-*
 ‘ *west*, by night in a place where four ways meet :

120. ' Let him daily offer to her in fire the
 ' fat of that *afs*, and, at the close *of the ceremony*,
 ' let him offer clarified butter, with the holy
 ' text *Sem* and so forth, to PAVANA, to INDRA,
 ' to VRĪHASPATI, and to AGNI, *regents of*
 ' *wind, clouds, a planet, and fire.*

121. ' A voluntary effusion, *naturally or*
 ' *otherwise*, of that which may produce a man
 ' by a twiceborn youth during the time of his
 ' studentship *or before marriage*, has been pro-
 ' nounced *avacīrna*, or a violation of the rule
 ' prescribed *for the first order*, by sages, who
 ' knew the whole system of duty, and uttered
 ' the words of the *Vēda*.

122. ' To the four *deities of purification*,
 ' MA'RUTA, INDRA, VRĪHASPATI, AGNI,
 ' goes all the divine light, which the *Vēda* had
 ' imparted, from the student, who commits the
 ' foul sin *avacīrna*;

123. ' But, this crime having actually been
 ' committed, he must go begging to seven
 ' houses, clothed only with the hide of the *sa-*
 ' *crificed afs*, and openly proclaiming his act:

124. ' Eating a single meal begged from
 ' them, at the regular time of the day, *that is*,
 ' *in the morning or evening*, and bathing *each*
 ' *day* at the three *śravanas*, he shall be absolved
 ' from his guilt at the end of one year.

125. ' HE, who has voluntarily committed
 ' any sin, which causes a loss of class, must per-
 ' form the *tormenting* penance, *thence* called
 ' *śāntapana*; or the *prājāpatya*, if he offended
 ' involuntarily.

126. ' FOR sins, which degrade to a mixed
 ' class, or exclude from society, the sinner must
 ' have recourse to the *lunar* expiation *chāndrāy-*
 ' *ana* for one month: to atone for acts, which
 ' occasion defilement, he must swallow nothing
 ' for three days but hot barleygruel.

127. ' FOR killing *intentionally* a *virtuous*
 ' man of the military class, the penance must be
 ' a fourth part of that ordained for killing a
 ' priest; for killing a *Vaiśya*, only an eighth;
 ' for killing a *Sūdra*, who had been constant in
 ' *discharging* his duties, a sixteenth part:

128. ' But, if a *Brāhmen* kill a *Cshatriya*
 ' without malice, he must, after a full perform-
 ' ance of his religious rites, give the priests one
 ' bull together with a thousand cows;

129. ' Or he may perform for three years
 ' the penance for slaying a *Brāhmen*, mortify-
 ' ing his organs of sensation and action, letting
 ' his hair grow long, and living remote from
 ' the town, with the root of a tree for his man-
 ' sion,

130. ' If he kill *without malice* a *Vaiśya*, who

‘ had a good moral character, he may perform
 ‘ the same penance for one year, or give the
 ‘ priests a hundred cows and a bull:

131. ‘ For six months must he perform this
 ‘ whole penance, if *without intention* he kill a *Sú-*
 ‘ *dra*; or he may give ten white cows and a
 ‘ bull to the priests.

132. ‘ If he kill *by design* a cat, or an ich-
 ‘ neumon, the bird *Cbásha*, or a frog, a dog, a
 ‘ lizard, an owl, or a crow, he must perform
 ‘ the *ordinary* penance required for the death of
 ‘ a *Súdra*, that is, the *chándráyana*:

133. ‘ Or, *if he kill one of them undesignedly*,
 ‘ he may drink nothing but milk for three *days*
 ‘ *and* nights, or *each night* walk a *yógan*, or
 ‘ *thrice* bathe in a river, or silently repeat the
 ‘ text on the divinity of water; *that is, if he be*
 ‘ *disabled by real infirmity from performing the*
 ‘ *first mentioned penances, he may have recourse to*
 ‘ *the next in order.*

134. ‘ A *Brábmén*, if he kill a snake, must
 ‘ give to *some priest* a hoe, or *ironbeaded stick*; if
 ‘ an eunuch, a load of ricestraw, and a *másha* of
 ‘ lead;

135. ‘ If a boar, a pot of clarified butter; if
 ‘ the bird *tittiri*, a *aróna* of *tila* seeds: if a par-
 ‘ rot, a steer two years old; if the waterbird
 ‘ *vanatba*, a steer aged three years:

136. ‘ If he kill a *goose*, or a phenicopteros, a

‘ *heron, or cormorant, a bittern, a peacock, an*
 ‘ *ape, a hawk, or a kite, he must give a cow to*
 ‘ *some Brábmén :*

137. ‘ If he kill a horse, he must give a
 ‘ mantle; if an elephant, five black bulls; if a
 ‘ goat or a sheep, one bull; if an ass, a calf one
 ‘ year old:

138. ‘ If he kill a carnivorous wild beast, he
 ‘ must give a cow with abundance of milk; if a
 ‘ wild beast not carnivorous, a fine heifer; and
 ‘ a *raeticá* of gold, if he slay a camel:

139. ‘ If he kill a woman *of any class* caught
 ‘ in adultery, he must give as an expiation, in
 ‘ the direct order of the four classes, a leathern
 ‘ pouch, a bow, a goat, and a sheep.

140. ‘ Should a *Brábmén* be unable to expi-
 ‘ ate by gifts the sin of killing a snake and the
 ‘ rest, he must atone for his guilt by perform-
 ‘ ing, on each occasion, the penance *prájjapatya*.

141. ‘ For the slaughter of a thousand small
 ‘ animals which have bones, or for that of
 ‘ boneless animals enow to fill a cart, he must
 ‘ perform the *cbándráyana*, or common penance
 ‘ for killing a *Súdra*;

142. ‘ But, for killing boned animals, he
 ‘ must also give some trifle, *as a pana of copper,*
 ‘ to a *Brábmén*: for killing those without bones,
 ‘ he may be absolved by holding his breath, *at*
 ‘ *the close of his penance,* while he thrice repeats

‘ the *gáyatrî* with its *head*, the *pranava*, and the
 ‘ *vyábrîtis*.

143. ‘ For cutting *once without malice* trees
 ‘ yielding fruit, shrubs with many crowded
 ‘ stems, creeping or climbing plants, or such as
 ‘ grow again when cut, if they were in blossom
 ‘ *when he hurt them*, he must repeat a hundred
 ‘ texts of the *Véda*.

144. ‘ For killing insects of any sort bred in
 ‘ rice or other grains, or those bred in honey or
 ‘ *other* fluids, or those bred in fruit or flowers,
 ‘ eating clarified butter is a full expiation.

145. ‘ If a man cut, *wantonly and* for no
 ‘ good purpose, such grasses as are cultivated,
 ‘ or such as rise in the forest spontaneously, he
 ‘ must wait on a cow for one day, nourished by
 ‘ milk alone.

146. ‘ By these penances may mankind atone
 ‘ for the sin of injuring sentient creatures, whe-
 ‘ ther committed by design or through inadvert-
 ‘ ence: hear now what penances are ordained
 ‘ for eating or drinking what ought not to be
 ‘ tasted.

147. ‘ HE, who drinks undesignedly any spi-
 ‘ rit *but that of rice*, may be absolved by a new
 ‘ investiture with the sacrificial string: even for
 ‘ drinking intentionally *the weaker sorts of spirit*,
 ‘ a penance extending to death must not (as the
 ‘ law is now fixed) be prescribed.

148. ' For drinking water which has stood
 ' in a vessel, where spirit of rice or any other
 ' spirituous liquor had been kept, he must swallow
 ' nothing, for five *days and* nights, but the
 ' plant *sanc'hapushpi* boiled in milk:

149. ' If he touch any spirituous liquor, or
 ' give any away, or accept any in due form, or
 ' *with thanks*, or drink water left by a *Súdra*,
 ' he must swallow nothing, for three *days and*
 ' nights, but *cus'a-grafs* boiled in water.

150. ' Should a *Bráhmen*, who has once tasted
 ' the holy juice of the moonplant, even smell
 ' the breath of a man who has been drinking
 ' spirits, he must remove the taint by thrice repeating
 ' the *gáyatrì*, while he suppresses his
 ' breath in water, and by eating clarified butter
 ' *after that ceremony*.

151. ' If any of the three twiceborn classes
 ' have tasted unknowingly human ordure or
 ' urine, or any thing that has touched spirituous
 ' liquor, they must, *after a penance*, be girt
 ' anew with the sacrificial thread;

152. ' But, in such new investiture of the
 ' twiceborn, the partial tonsure, the zone, the
 ' staff, the petition of alms, and the strict rules
 ' of abstinence, need not be renewed.

153. ' Should one of them eat the food of
 ' those persons, with whom he ought never to
 ' eat, or food left by a woman or a *Súdra*, or

‘ any prohibited flesh, he must drink barleygruel
 ‘ only for seven *days and nights*.

154. ‘ If a *Brábmén* drink sweet liquors
 ‘ turned acid, or astringent juices from impure
 ‘ fruits, he becomes unclean, as long as those
 ‘ fluids remain undigested.

155. ‘ Any twiceborn man, who *by accident*
 ‘ has tasted the dung or urine of a tame boar,
 ‘ an ass, a camel, a shakal, an ape or a crow,
 ‘ must perform the penance *chándráyana* :

156. ‘ If he taste dried fleshmeat, or mush-
 ‘ rooms rising from the ground, or any thing
 ‘ brought from a slaughter-house, though he
 ‘ knew not whence it came, he must perform
 ‘ the same penance.

157. ‘ For *knowingly* eating the flesh of car-
 ‘ nivorious beasts, of town-boars, of camels, of
 ‘ gallinaceous birds, of human creatures, of
 ‘ crows, or of asses, the penance *taptacrīb'bra*,
 ‘ or *burning and severe*, is the only atonement.

158. ‘ A *Brábmén*, who, before he has com-
 ‘ pleted his theological studies, eats food at
 ‘ monthly obsequies to one ancestor, must fast
 ‘ three days *and nights*, and sit in water a day :

159. ‘ But a student in theology, who at any
 ‘ time *unknowingly* tastes honey or flesh, must
 ‘ perform the lowest penance, or the *prájápatya*,
 ‘ and proceed to finish his studentship.

160. ‘ Having eaten what has been left by a

‘ cat, a crow, a mouse, a dog, or an ichneumon,
 ‘ or what has even been touched by a louse, he
 ‘ must drink, *boiled in water*, the plant *brab-*
 ‘ *musuverchalá*.

161. ‘ By the man, who seeks purity of soul,
 ‘ no forbidden food must be tasted: what he has
 ‘ undesignedly swallowed he must instantly
 ‘ vomit up, or must purify himself with speed
 ‘ by legal expiations.

162. ‘ Such, as have been declared, are the
 ‘ various penances for eating prohibited food:
 ‘ hear now the law of penance for an expiation
 ‘ of theft.

163. ‘ THE chief of the twiceborn, having
 ‘ voluntarily stolen such property, as grain, raw
 ‘ or dressed, from the house of another *Bráb-*
 ‘ *men*, shall be absolved on performing the pe-
 ‘ nance *prájápatya* for a whole year;

164. ‘ But the penance *chándráyana* must be
 ‘ performed for stealing a man, woman, or
 ‘ child, for seizing a field, or a house, or for
 ‘ taking the waters of an enclosed pool or well.

165. ‘ Having taken goods of little value
 ‘ from the house of another man, he must pro-
 ‘ cure absolution by performing the penance
 ‘ *sántapana*; having first restored, *as the peni-*
 ‘ *tent thief always must*, the goods that he stole.

166. ‘ For taking what may be eaten, or
 ‘ what may be sipped, a carriage, a bed, or a

‘ seat, roots, flowers, or fruit, an atonement
 ‘ may be made by swallowing the five pure
 ‘ things produced from a cow, *or milk; curds,*
 ‘ *butter, urine, dung:*

167. ‘ For stealing grass, wood, or trees, rice
 ‘ in the husk, molasses, cloth or leather, fish, or
 ‘ other animal food, a strict fast must be kept
 ‘ three *days and three* nights.

168. ‘ For stealing gems, pearls, coral, copper,
 ‘ silver, iron, brass, or stone, nothing but
 ‘ broken rice must be swallowed for twelve
 ‘ days;

169. ‘ And nothing but milk for three days,
 ‘ if cotton, or silk, or wool had been stolen, or
 ‘ a beast either with cloven or uncloven hoofs,
 ‘ or a bird, or perfumes, or medicinal herbs, or
 ‘ cordage.

170. ‘ By these penances may a twiceborn
 ‘ man atone for the guilt of theft; but the following
 ‘ austerities only can remove the sin of
 ‘ carnally approaching those, who must not be
 ‘ carnally approached.

171. ‘ He, who has wasted his manly
 ‘ strength with sisters by the same womb, with
 ‘ the wives of his friend or of his son, with girls
 ‘ under the age of puberty, or with women of
 ‘ the lowest classes, must perform the penance
 ‘ ordained for defiling the bed of a preceptor:

172. ‘ He, who has carnally known the

‘ daughter of his paternal aunt, *who is almost equal to* a sister, or the daughter of his maternal aunt, or the daughter of his maternal uncle, *who is* a near kinsman, must perform the *chándráyana*, or *lunar penance*;

173. ‘ No man of sense would take one of those three as his wife: they shall not be taken in marriage by reason of their consanguinity; and he, who marries any one of them, falls deep into *sin*.

174. ‘ He, who has wasted, what might have produced a man, with female brute animals, with a woman during her courses, or in any but the natural part, or in water, must perform the penance *sántapana*: *for a bestial act with a cow the penance must be far more severe*.

175. ‘ A twiceborn man, dallying lasciviously with a male *in any place or at any time*, or with a female in a carriage drawn by bullocks, or in water, or by day, *shall be degraded, and* must bathe himself *publickly*, with his apparel.

176. ‘ Should a *Bráhmen* carnally know a woman of the *Chandála* or *Mlech'ha* tribes, or taste their food, or accept a gift from them, he loses his own class, *if he acted unknowingly*. or, *if knowingly*, sinks to a level *with them*.

177. ‘ A wife, excessively corrupt, let her husband confine to one apartment, and compel

‘ her to perform the penance ordained for a
 ‘ man, who has committed adultery :

178. ‘ If, having been solicited by a man of
 ‘ her own class, she again be defiled, her expia-
 ‘ tion must be the penance *prájápatya* added to
 ‘ the *chándráyana*.

179. ‘ The guilt of a *Brábmén*, who has dal-
 ‘ lied a whole night with a *Cbandáli* woman, he
 ‘ may remove in three years by subsisting on
 ‘ alms, and incessantly repeating the *gáyatrì*
 ‘ with other mysterious texts.

180. ‘ These penances have been declared for
 ‘ sinners of four sorts, *those who hurt sentient*
 ‘ *creatures, those who eat prohibited food, those*
 ‘ *who commit theft, and those who are guilty of*
 ‘ *lasciviousness*: hear now the prescribed expia-
 ‘ tion for such, as hold any intercourse with de-
 ‘ graded offenders.

181. ‘ HE, who associates himself for one
 ‘ year with a fallen sinner, falls like him; not
 ‘ by sacrificing, reading the *Véda*, or contracting
 ‘ affinity with him, *since by those acts he loses his*
 ‘ *class immediately*, but even by using the same
 ‘ carriage or seat, or by taking his food at the
 ‘ same board :

182. ‘ That man, who holds an intercourse
 ‘ with any one of those degraded offenders,
 ‘ must perform, as an atonement for such inter-

course, the penance ordained for that sinner
 ‘ himself.

183. ‘ The *sapindas* and *samánódacas* of a man
 ‘ degraded, *for a crime in the first degree*, must
 ‘ offer a libation of water to his manes, *as if he*
 ‘ *were naturally dead*, out of the town, in the
 ‘ evening of some inauspicious day, *as the ninth*
 ‘ *of the moon*, his paternal kinsmen, his officiat-
 ‘ ing priest, and his spiritual guide being present.

184. ‘ A female slave must kick down with
 ‘ her foot an old pot filled with water, *which*
 ‘ *had for that purpose been placed towards the*
 ‘ *south*, as if it were an oblation for the dead;
 ‘ and all the kinsmen, in the nearer and remoter
 ‘ degrees, must remain impure for a day and a
 ‘ night:

185. ‘ They must thenceforth desist from
 ‘ speaking to him, from sitting in his company,
 ‘ from delivering to him any inherited or other
 ‘ property, and from every civil or usual atten-
 ‘ tion, *as inviting him on the first day of the year,*
 ‘ *and the like.*

186. ‘ His right of primogeniture, *if he was*
 ‘ *an elder brother*, must be withholden from
 ‘ him, and whatever perquisites arise from pri-
 ‘ ority of birth: a younger brother excelling
 ‘ him in virtue, must appropriate the share of
 ‘ the firstborn.

187. ' But, when he has performed his due penance, his kinsmen and he must throw down a new vessel full of water, after having bathed together in a pure pool :

188. ' Then must he cast that vessel into the water; and, having entered his house, he may perform, as before, all the acts incident to his relation by blood.

189. ' The same ceremony must be performed by the kindred even of women degraded, for whom clothes, dressed rice, and water must be provided ; and they must dwell *in butis* near the family house.

190. ' With finners, whose expiations are unperformed, let not a man transact business of any kind; but those, who have performed their expiations, let him at no time reproach:

191. Let him not, however, live with those, who have slain children, or injured their benefactors, or killed suppliants for protection, or put women to death, even though such offenders have been legally purified.

192. ' THOSE men of the twiceborn classes, to whom the *gáyatrî* has not been repeated and explained, according to law, the assembly must cause to perform three *prájápatya* penances, and *afterwards* to be girt with the sacrificial string;

193. ‘ And the same penance they must pre-
 ‘ scribe to such twiceborn men, as are anxious
 ‘ to atone for some illegal act, or a neglect of
 ‘ the *Véda*.

194. ‘ If priests have accepted any property
 ‘ from base hands, they may be absolved by re-
 ‘ linquishing the presents, by repeating mysteri-
 ‘ ous texts, and by acts of devotion :

195. ‘ By three thousand repetitions of the
 ‘ *gáyatrî* with intense application of mind, and
 ‘ by subsisting on milk only for a whole month
 ‘ in the pasture of cows, a *Brábmén*, who has
 ‘ received any gift from a bad man, or a bad
 ‘ gift from any man, may be cleared from sin.

196. ‘ When he has been mortified by absti-
 ‘ nence, and has returned from the pasturage,
 ‘ let him bend low to the other *Brábméns*, who
 ‘ must thus interrogate him: “ Art thou really
 ‘ desirous, good man, of readmission to an
 ‘ equality with us?”

197. ‘ If he answer in the affirmative, let
 ‘ him give some grass to the cows, and in the
 ‘ place, made pure by their having eaten on it,
 ‘ let the men of his class give their assent to his
 ‘ readmission.

198. ‘ HE, who has officiated at a sacrifice
 ‘ for outcasts, or burned the corpse of a stranger,
 ‘ or performed rites to destroy the innocent, or
 ‘ made the impure sacrifice, called *Abína*, may

‘ expiate his guilt by three *prájápatya* penances.

199. ‘ A TWICEBORN man, who has rejected a suppliant for his protection, or taught the *Véda* on a forbidden day, may atone for his offence by subsisting a whole year on barley alone.

200. ‘ HE, who has been bitten by a dog, a shakal, or an afs, by any carnivorous animal frequenting a town, by a man, a horse, a camel, or a boar, may be purified by stopping his breath during one repetition of the *gáyatrî*.

201. ‘ To eat *only* at the time of the sixth meal, *or on the evening of every third day*, for a month, to repeat a *Sanbità* of the *Védas*, and to make *eight* oblations to fire, accompanied with *eight* holy texts, are always an expiation for those, who are excluded from society at repasts.

202. ‘ SHOULD a *Bráhmén* voluntarily ascend a carriage borne by camels or drawn by asses, or designedly bathe quite naked, he may be absolved by one suppression of breath, while he repeats in his mind the most holy text.

203. ‘ HE, who has made any excretion, being greatly pressed, either without water *near him*, or in water. may be purified by

‘ bathing in his clothes out of town, and by
‘ touching a cow.

204. ‘ For an omission of the acts, which
‘ the *Vēda* commands to be constantly perform-
‘ ed, and for a violation of the duties prescribed
‘ to a housekeeper, the atonement is fasting *one*
‘ day.

205. ‘ HE, who says hush or pish to a *Bráh-*
‘ *men*, or thou to a *superior*, must *immediately*
‘ bathe, eat nothing for the rest of the day, and
‘ appease him by clasping his feet with respect-
‘ ful salutation.

206. ‘ For striking a *Brábmén* even with a
‘ blade of grass, or tying him by the neck with
‘ a cloth, or overpowering him in argument,
‘ and adding contemptuous words, the offender
‘ must soothe him by falling prostrate.

207. ‘ An assaulter of a *Brábmén*, with intent
‘ to kill, shall remain in hell a hundred years;
‘ for actually striking him *with the like intent*, a
‘ thousand :

208. ‘ As many small pellets of dust as the
‘ blood of a *Brábmén* collects on the ground,
‘ for so many thousand years must the shedder
‘ of that blood be tormented in hell.

209. ‘ For a simple assault, the first *or com-*
‘ *mon* penance must be performed; for a bat-
‘ tery, the *third or* very severe penance; but

‘ for shedding blood, *without killing*, both of
 ‘ those penances.

210. ‘ To remove the sins, for which no
 ‘ particular penance has been ordained, the
 ‘ assembly must award a fit expiation, consider-
 ‘ ing the ability of the sinner *to perform it*, and
 ‘ the *nature of the sin*.

211. ‘ THOSE penances, by which a man
 ‘ may atone for his crimes, I now will describe
 ‘ to you; penances, which have been perform-
 ‘ ed by deities, by holy sages, and by forefathers
 ‘ *of the human race*.

212. ‘ WHEN a twiceborn man performs
 ‘ the *common* penance, *or that* of PRAJA’PATI,
 ‘ he must for three days eat only in the morn-
 ‘ ing; for three days, only in the evening; for
 ‘ three days, food unasked *but presented to him*;
 ‘ and for three more days, nothing.

213. ‘ Eating *for a whole day* the dung and
 ‘ urine of cows mixed with curds, milk, cla-
 ‘ rified butter, and water boiled with *cus’a-grafs*,
 ‘ and then fasting entirely for a *day and a night*,
 ‘ is the penance called *Sántapana*, either from
 ‘ the devout man SANTAPANA, or from *tor-*
 ‘ *menting*.

214. ‘ A twiceborn man performing the pe-
 ‘ nance, called very severe, *in respect of the com-*
 ‘ *mon*, must eat, as before, a single mouthful, *or*

‘ a ball of rice as large as a hen’s egg, for three
 ‘ times three days; and for the last three days,
 ‘ must wholly abstain from food.

215. ‘ A *Bráhma*n, performing the ardent
 ‘ penance, must swallow nothing but hot water,
 ‘ hot milk, hot clarified butter, and hot steam,
 ‘ each of them for three days successively, per-
 ‘ forming an ablution, and mortifying all his
 ‘ members.

216. ‘ A total fast for twelve days *and nights*,
 ‘ by a penitent with his organs controlled and
 ‘ his mind attentive, is the penance named *pa-*
 ‘ *raca*, which expiates all *degrees of* guilt.

217. ‘ If he diminish his food by one mouth-
 ‘ ful *each day* during the dark fortnight, *eating*
 ‘ *fifteen mouthfuls on the day of the opposition*, and
 ‘ increase it *in the same proportion*, during the
 ‘ bright fortnight, *fasting entirely on the day of*
 ‘ *the conjunction*, and perform an ablution regu-
 ‘ larly at sunrise, noon, and sunset, this is the
 ‘ *chándráyana*, or the lunar penance :

218. ‘ Such is the *penance* called ant-shaped
 ‘ *or narrow in the middle*; but, if he perform the
 ‘ barley-shaped *or broad in the middle*, he must
 ‘ observe the same rule, beginning with the
 ‘ bright halfmonth, and keeping under com-
 ‘ mand his organs of action and sense.

219. ‘ To perform the lunar penance of an

‘ anchoret, he must eat only eight mouthfuls
 ‘ of forest grains at noon *for a whole month*, tak-
 ‘ ing care to subdue his mind.

220. ‘ If a *Bráhmén* eat only four mouthfuls
 ‘ at sunrise, and four at sunset, *for a month*,
 ‘ keeping his organs controlled, he performs
 ‘ the lunar penance of children.

221. ‘ He, who, for a whole month, eats no
 ‘ more than thrice eighty mouthfuls of wild
 ‘ grains, *as he happens* by any means *to meet*
 ‘ *with them*, keeping his organs in subjection,
 ‘ shall attain the same abode with the regent of
 ‘ the moon:

222. ‘ The eleven *Rudras*, the twelve *A'di-*
 ‘ *tyas*, the eight *Vasus*, the *Maruts*, or genii of
 ‘ the winds, and the seven great *Rishis*, have
 ‘ performed this lunar penance as a security
 ‘ from all evil.

223. ‘ The oblation of *clarified butter* to fire
 ‘ must every day be made by *the penitent him-*
 ‘ *self*, accompanied with the mighty words
 ‘ *earth, sky, heaven*; he must perfectly abstain
 ‘ from injury to sentient creatures, from false-
 ‘ hood, from wrath, and from all crooked
 ‘ ways.

224. ‘ Or, thrice each day and thrice each
 ‘ night for a month, the penitent may plunge
 ‘ into water clothed in his mantle, and at no

‘ time conversing with a woman, a *Súdra*, or
 ‘ an outcast.

225. ‘ LET him be always in motion, sitting
 ‘ and rising alternately, or, if unable *to be thus*
 ‘ *restless*, let him sleep low *on the bare ground*;
 ‘ chaste as a student of the *Véda*, bearing the
 ‘ sacred zone and staff, showing reverence to
 ‘ his preceptor, to the gods, and to priests;

226. ‘ Perpetually must he repeat the *gáyatrî*,
 ‘ and other pure texts to the best of his know-
 ‘ ledge: thus in all penances for absolution from
 ‘ sin, must he vigilantly employ himself.

227. ‘ By these expiations are twiceborn
 ‘ men absolved, whose offences are publickly
 ‘ known, *and are mischievous by their example*;
 ‘ but for sins not publick, the assembly of priests
 ‘ must award them penances, with holy texts
 ‘ and oblations to fire.

228. ‘ By open confession, by repentance,
 ‘ by devotion, and by reading the scripture, a
 ‘ sinner may be released from his guilt; or by
 ‘ almsgiving, in case of his inability *to perform*
 ‘ *the other acts of religion*.

229. ‘ In proportion as a man, who has
 ‘ committed a sin, shall truly and voluntarily
 ‘ confess it, so far he is disengaged from that
 ‘ offence, like a snake from his slough;

230. ‘ And, in proportion as his heart sin-

‘cerely loathes his evil deed, so far shall his
‘vital spirit be freed from the taint of it.

231. ‘If he commit sin, and actually repent,
‘that sin shall be removed from him; but if
‘he merely say, “I will sin thus no more,”
‘he can only be released by an actual absti-
‘nence from guilt.

232. ‘Thus revolving in his mind the cer-
‘tainty of retribution in a future state, let him
‘be constantly good in thoughts, words, and
‘action.

233. ‘If he desire complete remission of any
‘foul act which he has committed, either igno-
‘rantly or knowingly, let him beware of com-
‘mitting it again: *for the second fault his pe-
‘nance must be doubled.*

234. ‘If, having performed any expiation,
‘he feel not a perfect satisfaction of conscience,
‘let him repeat the same devout act, until his
‘conscience be perfectly satisfied.

235. ‘All the bliss of deities and of men is
‘declared by sages, who discern the sense of
‘the *Véda*, to have in devotion its cause, in de-
‘votion its continuance, in devotion its full-
‘ness.

236. ‘Devotion is *equal to the performance of*
‘*all duties; it is* divine knowledge in a *Bráh-*
‘*men*; it is defence of the people in a *Cshatriya*;
‘devotion is *the business of trade and agriculture*

‘ in a *Vaishya* ; devotion is dutiful service in a
 ‘ *Súdra*.

237. ‘ Holy sages, with subdued passions,
 ‘ feeding only on fruit, roots, and air, by devo-
 ‘ tion alone are enabled to survey the three
 ‘ worlds, *terrestrial, ethereal, and celestial*, peopled
 ‘ with animal creatures, locomotive and fixed.

238. ‘ Perfect health, or unfailing medicines,
 ‘ divine learning, and the various mansions of
 ‘ deities, are acquired by devotion alone : their
 ‘ efficient cause is devotion.

239. ‘ Whatever is hard to be traversed, what-
 ‘ ever is hard to be acquired, whatever is hard
 ‘ to be visited, whatever is hard to be perform-
 ‘ ed, all this may be accomplished by true de-
 ‘ votion; for the difficulty of devotion is the
 ‘ greatest of all.

240. ‘ Even sinners in the highest degree,
 ‘ and of course the other offenders, are absolved
 ‘ from guilt by austere devotion well-practised.

241. ‘ *Souls, that animate* worms, and insects,
 ‘ serpents, moths, beasts, birds, and vegetables,
 ‘ attain heaven by the power of devotion.

242. ‘ Whatever sin has been conceived in
 ‘ the hearts of men, uttered in their speech, or
 ‘ committed in their bodily acts, they speedily
 ‘ burn it all away by devotion, if they preserve
 ‘ devotion as their best wealth.

243. ‘ Of a priest, whom devotion has puri-

‘fied, the divine spirits accept the sacrifices, and
 ‘grant the desires with ample increase.

244. ‘Even BRAHMA’, lord of creatures, by
 ‘devotion, enacted this code of laws; and the
 ‘sages by devotion acquired a knowledge of the
 ‘*Védas*.

245. ‘Thus the gods themselves, observing
 ‘in this universe the incomparable power of
 ‘devotion, have proclaimed aloud the tran-
 ‘scendent excellence of pious austerity.

246. ‘By reading each day as much as pos-
 ‘sible of the *Véda*, by performing the *five* great
 ‘sacraments, and by forgiving all injuries, even
 ‘sins of the highest degree shall be soon ef-
 ‘faced:

247. ‘As fire consumes in an instant with his
 ‘bright flame the wood, that has been placed
 ‘on it, thus, with the flame of knowledge, a
 ‘*Bráhmén*, who understands the *Véda*, consumes
 ‘all sin.

248. ‘Thus has been declared, according to
 ‘law, the mode of atoning for open sins: now
 ‘learn the mode of obtaining absolution for
 ‘secret offences.

249. ‘SIXTEEN suppressions of the breath,
 ‘while the holiest of texts is repeated with the
 ‘three mighty words, and the trilateral syllable,
 ‘continued each day for a month, absolve even

‘ the slayer of a *Bráhma*n from his hidden
‘ faults.

250. ‘ Even a drinker of spirituous liquors
‘ is absolved by repeating each day the text *apa*
‘ used by the sage CAUTSA, or that beginning
‘ with *preti* used by VASISHT’HA, or that called
‘ *mábitra*, or that, of which the first word is
‘ *suddhavatyab*.

251. ‘ By repeating *each day for a month* the
‘ text *ásyavámíya*, or the hymn *Sivasancalpa*,
‘ the stealer of gold from a priest becomes in-
‘ stantly pure.

252. ‘ He, who has violated the bed of his
‘ preceptor, is cleared *from secret faults* by re-
‘ peating *sixteen times a day* the text *havishyan-*
‘ *tiya*, or that beginning with *na tamanbab*, or
‘ by revolving in his mind the *sixteen* holy verses,
‘ called *Pauruṣha*.

253. ‘ The man, who desires to expiate *his*
‘ *hidden* sins, great and small, must repeat *once*
‘ *a day* for a year the text *ava*, or the text
‘ *yatcinchida*.

254. ‘ He, who has accepted an illegal pre-
‘ sent, or eaten prohibited food, may be cleansed
‘ in three days by repeating the text *taratṣa-*
‘ *mandíya*.

255. ‘ Though he have committed many
‘ secret sins, he shall be purified by repeating

‘ for a month the text *śomāraudra* or the three
 ‘ texts *áryamna*, while he bathes in a sacred
 ‘ stream.

256. ‘ A grievous offender must repeat the
 ‘ seven verses, beginning with *INDRA*, for half
 ‘ a year; and he, who has defiled water with
 ‘ any impurity, must sit a whole year subsisting
 ‘ by alms.

257. ‘ A twiceborn man, who shall offer
 ‘ clarified butter for a year, with *eight* texts ap-
 ‘ propriated to *eight* several oblations, or with
 ‘ the text *na mé*, shall efface a sin even of an
 ‘ extremely high degree.

258. ‘ He, who had committed a crime of
 ‘ the first degree, shall be absolved, if he attend
 ‘ a herd of kine for a year, mortify his organs,
 ‘ and continually repeat the texts beginning
 ‘ with *pávamáni*, living solely on food given in
 ‘ charity:

259. ‘ Or, if he thrice repeat a *Sanhitá* of
 ‘ the *Védas*, or a large portion of them with all
 ‘ the mantras and bráhmaṇas, dwelling in a fo-
 ‘ rest with subdued organs, and purified by three
 ‘ *pañcas*, he shall be set free from all sins how
 ‘ heinous soever.

260. ‘ Or he shall be released from all deadly
 ‘ sins, if he fast three days, with his members
 ‘ mortified, and twice a day plunge into water,
 ‘ thrice repeating the text *aghamarśhana*:

261. ' As the sacrifice of a horse, the king
 ' of sacrifices, removes all sins, thus the text
 ' *aghamarshana* destroys all offences.

262. ' A priest who should retain in his me-
 ' mory the whole *Rigvéda*, would be absolved
 ' from guilt, even if he had slain the inhabitants
 ' of the three worlds, and had eaten food from
 ' the foulest hands.

263. ' By thrice repeating the *mantras* and
 ' *bráhmaṇas* of the *Rîch*, or those of the *Yajush*,
 ' or those of the *Sáman*, with the *upanishads*, he
 ' shall perfectly be cleansed from every possible
 ' taint :

264. ' As a clod of earth, cast into a great
 ' lake, sinks in it, thus is every sinful act sub-
 ' merged in the triple *Véda*.

265. ' The divisions of the *Rîch*, the several
 ' branches of the *Yajush*, and the manifold
 ' strains of the *Sáman* must be considered as
 ' forming the triple *Véda*: he knows the *Véda*,
 ' who knows them collectively.

266. ' The primary triliteral syllable, in
 ' which the three *Védas* themselves are com-
 ' prised, must be kept secret, as another triple
 ' *Véda*: he knows the *Véda*, who *distinctly*
 ' knows *the mystick sense* of that word.'

CHAPTER THE TWELFTH.

On Transmigration and final Beatitude.

1. ‘O THOU, who art free from sin, *said*
‘*the devout sages*, thou hast declared the whole
‘system of duties ordained for the four classes
‘of men: explain to us now, from the first
‘principles, the ultimate retribution for their
‘deeds.’

2. BHRĪGU, whose heart was the pure essence
of virtue, who proceeded from MENU himself,
thus addressed the great sages: ‘Hear the in-
‘fallible rules for *the fruit of* deeds in this
‘universe.

3. ‘ACTION, either mental, verbal, or cor-
‘poreal, bears good or evil fruit, *as itself is good*
‘*or evil*; and from the actions of men proceed
‘their various transmigrations in the highest,
‘the mean, and the lowest degree :

4. ‘Of that threefold action, connected with
‘bodily functions, disposed in three classes, and
‘consisting of ten orders, be it known in this
‘world, that the heart is the instigator.

5. ‘ Devising means to appropriate the
 ‘ wealth of other men, resolving on any forbid-
 ‘ den deed, and conceiving notions of atheism
 ‘ or materialism, are the three bad acts of the
 ‘ mind :

6. ‘ Scurrilous language, falsehood, indiscri-
 ‘ minate backbiting, and useless tattle, are the
 ‘ four bad acts of the tongue :

7. ‘ Taking effects not given, hurting sentient
 ‘ creatures without the sanction of law, and
 ‘ criminal intercourse with the wife of another,
 ‘ are the three bad acts of the body; *and all the*
 ‘ *ten have their opposites, which are good in an*
 ‘ *equal degree.*

8. ‘ A rational creature has a reward or
 ‘ a punishment for mental acts, in his mind;
 ‘ for verbal acts, in his organs of speech; for
 ‘ corporeal acts, in his bodily frame.

9. ‘ For sinful acts mostly corporeal, a man
 ‘ shall assume *after death* a vegetable or mi-
 ‘ neral form; for such acts mostly verbal, the
 ‘ form of a bird or a beast; for acts mostly
 ‘ mental, the lowest of human conditions:

10. ‘ He, whose firm understanding obtains
 ‘ a command over his words, a command over
 ‘ his thoughts, and a command over his whole
 ‘ body, may justly be called a *tridandi*, or *triple*
 ‘ *commander*; *not a mere anchoret, who bears*
 ‘ *three visible slaves.*

11. ' The man, who exerts this triple self-
' command with respect to all animated crea-
' tures, wholly subduing both lust and wrath,
' shall by those means attain beatitude.

12. ' THAT substance, which gives a power
' of motion to the body, the wise call *śhētra-*
' *jnya*; or *jīvātman*, the vital spirit; and that
' body, which thence derives active functions,
' they name *bhūtātman*, or *composed of elements*:

13. ' Another internal spirit, called *māhat*,
' or *the great soul*, attends the birth of all crea-
' tures imbodyed, and thence in all mortal
' forms is conveyed a perception either pleasing
' or painful.

14. ' Those two, the vital spirit and reason-
' able soul, are closely united with *five* ele-
' ments, but connected with the supreme spirit,
' or divine essence, which pervades all beings
' high and low :

15. ' From the substance of that *supreme*
' *spirit* are diffused, *like sparks from fire*, innu-
' merable vital spirits, which perpetually give
' motion to creatures exalted and base.

16. ' By the vital souls of those men, who
' have committed sins *in the body reduced to*
' *ashes*, another body, composed of *nerves with*
' *five sensations*, in order to be susceptible of
' torment, shall certainly be assumed after
' death;

17. ‘ And, being intimately united with
 ‘ those minute nervous particles, according to
 ‘ their distribution, they shall feel, in that new
 ‘ body, the pangs inflicted in each case by the
 ‘ sentence of YAMA.

18. ‘ When the vital soul has gathered the
 ‘ fruit of sins, which arise from a love of
 ‘ sensual pleasure, but must produce misery,
 ‘ and, when its taint has thus been removed, it
 ‘ approaches again those two most effulgent
 ‘ essences *the intellectual soul and the divine spirit*:

19. ‘ They two, closely conjoined, examine
 ‘ without remission the virtues and vices of that
 ‘ sensitive soul, according to its union with
 ‘ which it acquires pleasure or pain in the pre-
 ‘ sent and future worlds.

20. ‘ If the vital spirit had practised virtue
 ‘ for the most part and vice in a small degree,
 ‘ it enjoys delight in celestial abodes, clothed
 ‘ with a body formed of pure elementary par-
 ‘ ticles;

21. ‘ But, if it had generally been addicted
 ‘ to vice, and seldom attended to virtue, then
 ‘ shall it be deserted by those pure elements,
 ‘ and, *having a coarser body of sensible nerves*, it
 ‘ feels the pains to which YAMA shall doom it:

22. ‘ Having endured those torments ac-
 ‘ cording to the sentence of YAMA, and its
 ‘ taint being almost removed, it again reaches

‘ those five pure elements in the order of their
‘ natural distribution.

23. ‘ Let each man, considering with his
‘ intellectual powers these migrations of the
‘ soul according to its virtue or vice, *into a*
‘ *region of bliss or pain*, continually fix his heart
‘ on virtue.

24. ‘ BE it known, that the three qualities
‘ of the rational soul are a tendency to goodness,
‘ to passion, and to darkness; and, endued with
‘ one or more of them, it remains incessantly
‘ attached to all these created substances:

25. ‘ When any one of the *three* qualities
‘ predominates in a mortal frame, it renders
‘ the imbodyed spirit eminently distinguished
‘ for that quality.

26. ‘ Goodness is declared to be true know-
‘ ledge; darkness, gross ignorance; passion, an
‘ emotion of desire or aversion: such is the
‘ compendious description of those qualities,
‘ which attend all souls.

27. ‘ When a man perceives in the reason-
‘ able soul a disposition tending to virtuous
‘ love, unclouded with any malignant passion,
‘ clear as the purest light, let him recognise it
‘ as the quality of goodness:

28. ‘ A temper of mind, which gives un-
‘ easiness and produces disaffection, let him
‘ consider as the adverse quality of passion,
‘ ever agitating imbodyed spirits:

29. ' That indistinct, inconceivable, unaccountable disposition of a mind naturally sensual, and clouded with infatuation, let him know to be the quality of darkness.

30. ' Now will I declare at large the various acts, in the highest, middle, and lowest degrees, which proceed from those three dispositions of mind.

31. ' Study of scripture, austere devotion, sacred knowledge, corporeal purity, command over the organs, performance of duties, and meditation on the divine spirit, accompany the good quality of the soul:

32. ' Interested motives for acts of *religion or morality*, perturbation of mind on slight occasions, commission of acts forbidden by law, and habitual indulgence in selfish gratifications, are attendant on the quality of passion:

33. ' Covetousness, indolence, avarice, detraction, atheism, omission of prescribed acts, a habit of soliciting favours, and inattention to necessary business, belong to the dark quality.

34. ' Of those three qualities, as they appear in the three times, *past, present and future*, the following in order *from the lowest* may be considered as a short *but certain* criterion.

35. ' Let the wise consider, as belonging to the quality of darkness, every act which a

‘ man is ashamed of having done, of doing, or
 ‘ of going to do:

36. ‘ Let them consider, as proceeding from
 ‘ the quality of passion, every act, by which a
 ‘ man seeks exaltation and celebrity in this
 ‘ world, though he may not be much afflicted,
 ‘ if he fail of attaining his object:

37. ‘ To the quality of goodness belongs
 ‘ every act, by which he hopes to acquire di-
 ‘ vine knowledge, which he is never ashamed
 ‘ of doing and which brings placid joy to his
 ‘ conscience.

38. ‘ Of the dark quality, as described, the
 ‘ principal object is pleasure; of the passionate,
 ‘ worldly prosperity; but of the good quality,
 ‘ the chief object is virtue: the last mentioned
 ‘ *objects* are superiour in dignity.

39. ‘ SUCH transmutations, as the soul pro-
 ‘ cures in this universe by each of those quali-
 ‘ ties, I now will declare in order succinctly.

40. ‘ Souls, endued with goodness, attain al-
 ‘ ways the state of deities; those filled with
 ‘ ambitious passions, the condition of men; and
 ‘ those immersed in darkness, the nature of
 ‘ beasts: this is the triple order of transmuta-
 ‘ tion.

41. ‘ Each of those three transmutations,
 ‘ caused by the several qualities, must also be
 ‘ considered as threefold, the lowest, the mean,

‘ and the highest, according to as many distinctions of acts and of knowledge.

42. ‘ Vegetable and mineral substances, worms, insects, and reptiles, some very minute, some rather larger, fish, snakes, tortoises, cattle, shakals, are the lowest forms, to which the dark quality leads:

43. ‘ Elephants, horses, men of the servile class, and contemptible *Mlécb’has*, or *barbarians*, lions, tigers, and boars, are the mean states procured by the quality of darkness:

44. ‘ Dancers and singers, birds and deceitful men, giants and bloodthirsty savages, are the highest conditions, to which the dark quality can ascend.

45. ‘ *J’ballas*, or cudgelplayers, *Mallas*, or boxers and wrestlers, *Natas*, or actors, those who teach the use of weapons, and those who are addicted to gaming or drinking, are the lowest forms occasioned by the passionate quality:

46. ‘ Kings, men of the fighting class, domestic priests of kings, and men skilled in the war of controversy, are the middle states caused by the quality of passion:

47. ‘ *Gandharvas*, or aerial musicians, *Guhyacacas* and *Yacsbas*, or servants and companions of CUVE’RA, genii attending superiour gods, as the *Vidyábaras* and others, together with

‘ various companies of *Apsarases* or nymphs,
 ‘ are the highest of those forms, which the
 ‘ quality of passion attains.

48. ‘ Hermits, religious mendicants, other
 ‘ *Bráhmens*, such orders of demigods as are
 ‘ wafted in airy cars, genii of the signs and
 ‘ lunar mansions, and *Daityas*, or the offspring
 ‘ of *DITI*, are the lowest of states procured by
 ‘ the quality of goodness:

49. ‘ Sacrificers, holy sages, deities of the
 ‘ lower heaven, genii of the *Védas*, regents of
 ‘ stars *not in the paths of the sun and moon*, di-
 ‘ vinities of years, *Pitrís* or progenitors of
 ‘ mankind, and the demigods, named *Sádhyas*,
 ‘ are the middle forms, to which the good
 ‘ quality conveys *all spirits moderately endued*
 ‘ *with it*:

50. ‘ *BRAHMA*’ with four faces, creators of
 ‘ worlds *under him*, as *MARI’CHI* and others, the
 ‘ genius of virtue, the divinities presiding over
 ‘ (*two principles of nature in the philosophy of*
 ‘ *CAPILA*) *mahat*, or the mighty, and *avyačta*,
 ‘ or *unperceived*, are the highest conditions, to
 ‘ which, by the good quality, souls are exalted.

51. ‘ This triple system of transmigrations,
 ‘ in which each class has three orders, accord-
 ‘ ing to actions of three kinds, and which com-
 ‘ prises all animated beings, has been revealed
 ‘ in its full extent:

52. ' Thus, by indulging the sensual appetites, and by neglecting the performance of duties, the basest of men, ignorant of sacred expiations, assume the basest forms.

53. ' WHAT particular bodies the vital spirit enters in this world, and in consequence of what sins here committed, now hear at large and in order.

54. ' Sinners in the first degree, having passed through terrible regions of torture for a great number of years, are condemned to the following births at the close of that period *to efface all remains of their sin.*

55. ' The slayer of a *Bráhmén* must enter *according to the circumstances of his crime* the body of a dog, a boar, an ass, a camel, a bull, a goat, a sheep, a stag, a bird, a *Chandála*, or a *Puccasa*.

56. ' A priest, who has drunk spirituous liquor, shall migrate into the form of a smaller or larger worm or insect, of a moth, of a fly feeding on ordure, or of some ravenous animal.

57. ' He, who steals the gold of a priest, shall pass a thousand times into the bodies of spiders, of snakes and cameleons, of *crocodiles* and other aquatick monsters, or of mischievous blood sucking demons.

58. ' He, who violates the bed of his *natural*

‘ *or spiritual* father, migrates a hundred times
 ‘ into the forms of grasses, of shrubs with
 ‘ crowded stems, or of creeping and twining
 ‘ plants, of *vultures and other* carnivorous ani-
 ‘ mals, of *lions and other* beasts with sharp teeth,
 ‘ or of *tigers and other* cruel brutes.

59. ‘ They who hurt any sentient beings,
 ‘ are born *cats and other* eaters of raw flesh;
 ‘ they, who taste what ought not to be tasted,
 ‘ maggots or small flies; they, who steal *ordi-*
 ‘ *nary things*, devourers of each other: they
 ‘ who embrace very low women, become rest-
 ‘ less ghosts.

60. ‘ He, who has held intercourse with
 ‘ degraded men, or been criminally connected
 ‘ with the wife of another, or stolen *common*
 ‘ *things* from a priest, shall be changed into a
 ‘ spirit, called *Brabmarácshasa*.

61. ‘ The wretch, who through covetous-
 ‘ ness has stolen *rubies or other* gems, pearls, or
 ‘ coral, or precious things of which there are
 ‘ many sorts, shall be born *in the tribe of gold-*
 ‘ *smiths*, or among *birds called* hémacáras, or
 ‘ *goldmakers*.

62. ‘ If a man steal grain in the husk, he
 ‘ shall be born a rat; if a yellow mixed metal,
 ‘ a gander; if water, a *plava*, or diver; if
 ‘ honey, a great stinging gnat; if milk, a crow;
 ‘ if expressed juice, a dog; if clarified butter, an
 ‘ ichneumon weasel;

63. ' If he steal fleshmeat, a vulture; if any
' sort of fat, the water-bird *madgu*; if oil, a
' blatta, or oildrinking beetle; if salt, a cicada
' or cricket; if curds, the bird *valáca*;

64. ' If silken clothes, the bird *tittiri*; if
' woven flax, a frog; if cotton cloth, the
' waterbird *crauncha*; if a cow, the lizard
' *gódbhá*; if molasses, the bird *vágguda*;

65. ' If exquisite perfumes, a muskrat; if pot-
' herbs, a peacock; if dressed grain in any of
' its various forms, a porcupine; if raw grain,
' a hedgehog;

66. ' If he steal fire, the bird *vaca*; if a
' household utensil, an ichneumon-fly; if dyed
' cloth, the bird *chacóra*;

67. ' If a deer or an elephant, he shall
' be born a wolf; if a horse, a tiger; if roots or
' fruit, an ape; if a woman, a bear; if water
' from a jar, the bird *chátaca*; if carriages, a
' camel; if small cattle, a goat.

68. ' That man, who designedly takes away
' the property of another, or eats any holy
' cakes not first presented to the deity at a
' solemn rite, shall inevitably sink to the con-
' dition of a brute.

69. ' Women, who have committed similar
' thefts, incur a similar taint, and shall be
' paired with those male beasts in the form
' of their females.

70. ' If any of the four classes omit, without

‘ urgent necessity, the performance of their
 ‘ several duties, they shall migrate into sinful
 ‘ bodies, and become slaves to their foes.

71. ‘ Should a *Bráhmen* omit his peculiar
 ‘ duty, he shall be changed into a demon called
 ‘ *Ulcámuc’ba* or *with a mouth like a firebrand*,
 ‘ who devours what has been vomited; a *Csha-*
 ‘ *triya*, into a demon called *Catapútana*, who
 ‘ feeds on ordure and carrion;

72. ‘ A *Vaijya*, into an evil being called
 ‘ *Maitrácshajyótica*, who eats purulent carcases;
 ‘ and a *Súdra*, who neglects his occupations,
 ‘ becomes a foul imbodied spirit called *Chailá-*
 ‘ *saca*, who feeds on lice.

73. ‘ As far as vital souls, addicted to sen-
 ‘ suality, indulge themselves in forbidden plea-
 ‘ sures, even to the same degree shall the acute-
 ‘ ness of their senses be raised *in their future*
 ‘ *bodies, that they may endure analogous pains*;

74. ‘ And, in consequence of their folly, they
 ‘ shall be doomed as often as they repeat their
 ‘ criminal acts, to pains more and more intense
 ‘ in despicable forms on this earth.

75. ‘ They shall first have a sensation of
 ‘ agony in *Támisra* or *utter darkness*, and in
 ‘ other seats of horror; in *Aśipatravana*, or
 ‘ *the swordleaved forest*, and in different places
 ‘ of binding fast and of rending:

76. ‘ Multifarious tortures await them: they

‘ shall be mangled by ravens and owls, shall
 ‘ swallow cakes boiling hot; shall walk over
 ‘ inflamed sands; and shall feel the pangs of
 ‘ being baked like the vessels of a potter :

77. ‘ They shall assume the forms of beasts
 ‘ continually miserable, and suffer alternate af-
 ‘ flictions from extremities of cold and of heat,
 ‘ surrounded with terrors of various kinds :

78. ‘ More than once shall they lie in differ-
 ‘ ent wombs; and, after agonizing births, be
 ‘ condemned to severe captivity, and to servile
 ‘ attendance on creatures like themselves :

79. ‘ Then shall follow separations from kin-
 ‘ dred and friends, forced residence with the
 ‘ wicked, painful gains and ruinous losses of
 ‘ wealth; friendships hardly acquired and at
 ‘ length changed into enmities,

80. ‘ Old age without resource, diseases at-
 ‘ tended with anguish, pangs of innumerable
 ‘ sorts, and, lastly, unconquerable death.

81. ‘ With whatever disposition of mind a
 ‘ man shall perform in this life any act *religious*
 ‘ *or moral*, in a future body endued with the
 ‘ same quality, shall he receive his retribution.

82. ‘ Thus has been revealed to you the
 ‘ system of punishments for evil deeds: next
 ‘ learn those acts of a *Bráhmén*, which lead to
 eternal bliss.

83. ‘ Studying and comprehending the *Véda*,

‘practising pious austerities, acquiring divine knowledge of *law and philosophy*, command over the organs of sense and action, avoiding all injury to sentient creatures, and showing reverence to a *natural and spiritual* father, are the chief branches of duty which ensure final happiness.’

84. ‘Among all those good acts performed in this world, *said the sages*, is no single act held more powerful than the rest in leading men to beatitude?’

85. ‘Of all those duties, *answered BHŔIGU*, the principal is to acquire from the *Upanishads* a true knowledge of one supreme GOD; that is the most exalted of all sciences, because it ensures immortality:

86. ‘In this life, indeed, as well as the next, the study of the *Véda*, to acquire a knowledge of GOD, is held the most efficacious of those six duties in procuring felicity to man;

87. ‘For in the knowledge and adoration of one GOD, which the *Véda* teaches, all the rules of good conduct, *beforementioned* in order, are fully comprised.

88. ‘THE ceremonial duty, prescribed by the *Véda*, is of two kinds; *one* connected with this world, and causing prosperity on earth; *the other* abstracted from it, and procuring bliss in heaven.

89. ‘ A religious act proceeding from selfish views in this world, *as a sacrifice for rain*, or in the next, *as a pious oblation in hope of a future reward*, is declared to be concrete and interested; but an act performed with a knowledge of GOD, and without self love, is called abstract and disinterested.

90. ‘ He, who frequently performs interested rites, attains an equal station with the regents of the lower heaven; but he, who frequently performs disinterested acts of religion, becomes for ever exempt from *a body composed of the five elements*:

91. ‘ Equally perceiving the supreme soul in all beings and all beings in the supreme soul, he sacrifices his own spirit by fixing it on the spirit of GOD, and approaches the nature of that sole divinity, who shines by his own effulgence.

92. ‘ Thus must the chief of the twiceborn, though he neglect the ceremonial rites mentioned in the *Sástras*, be diligent alike in attaining a knowledge of GOD and in repeating the *Véda*:

93. ‘ Such is the advantageous privilege of those, who have a double birth *from their natural mothers and from the gáyatrî their spiritual mother*, especially of a *Bráhmén*; since the twiceborn man by performing this duty but

‘not otherwise, may soon acquire endless felicity.

94. ‘To patriarchs, to deities, and to mankind, the scripture is an eye giving constant light; nor could the *Véda Sástra* have been made by human faculties; nor can it be measured by human reason *unassisted by revealed glosses and comments*: this is a sure proposition.

95. ‘Such codes of law as are not grounded on the *Véda*, and the various heterodox theories of men, produce no good fruit after death; for they all are declared to have their basis on darkness.

96. ‘All systems, which are repugnant to the *Véda*, must have been composed by mortals, and shall soon perish: their modern date proves them vain and false.

97. ‘The three worlds, the four classes of men, and their four distinct orders, with all that has been, all that is, and all that will be, are made known by the *Véda*:

98. ‘The nature of sound, of tangible and visible shape, of taste, and of odour, the fifth object of sense, is clearly explained in the *Véda* alone, together with the three qualities of mind, the births attended with them, and the acts which they occasion.

99. ‘All creatures are sustained by the primeval *Véda Sástra*, which the wise therefore

‘ hold supreme, because it is the supreme source
 ‘ of prosperity to this creature, man.

100. ‘ Command of armies, royal authority,
 ‘ power of inflicting punishment, and sovereign
 ‘ dominion over all nations, he only well de-
 ‘ serves, who perfectly understands the *Véda*
 ‘ *Sástra*.

101. ‘ As fire with augmented force burns
 ‘ up even humid trees, thus he, who well knows
 ‘ the *Véda*, burns out the taint of sin, which has
 ‘ infected his soul.

102. ‘ He, who completely knows the sense
 ‘ of the *Véda Sástra*, while he remains in any
 ‘ one of the four orders, approaches the divine
 ‘ nature, even though he sojourn in this low
 ‘ world.

103. ‘ They, who have read many books, are
 ‘ more exalted than such, as have seldom stu-
 ‘ died; they, who retain what they have read,
 ‘ than forgetful readers; they, who fully under-
 ‘ stand, than such as only remember; and they,
 ‘ who perform their known duty, than such
 ‘ men, as barely know it.

104. ‘ Devotion and sacred knowledge are
 ‘ the best means by which a *Brábmén* can arrive
 ‘ at beatitude: by devotion he may destroy
 ‘ guilt; by sacred knowledge he may acquire
 ‘ immortal glory.

105. ‘ Three modes of proof, ocular demon-

‘ stration, logical inference, and the authority
 ‘ of those various books, which are deduced
 ‘ from the *Vēda*, must be well understood by
 ‘ that man, who seeks a distinct knowledge of
 ‘ all his duties:

106. ‘ He alone comprehends the system of
 ‘ duties religious and civil, who can reason, by
 ‘ rules of logic agreeable to the *Vēda*, on the
 ‘ general heads of that system as revealed by
 ‘ the holy sages.

107. ‘ These rules of conduct, which lead to
 ‘ supreme bliss, have been exactly and compre-
 ‘ hensively declared: the more secret learning
 ‘ of this *Mānava Śāstra* shall now be disclosed.

108. ‘ IF it be asked, how the law shall be
 ‘ ascertained, when particular cases are not
 ‘ comprised *under any of the general rules, the*
 ‘ *answer is this:* “ That, which well instructed
 ‘ *Brāhmens* propound, shall be held incontestible
 ‘ law.”

109. ‘ Well instructed *Brāhmens* are they,
 ‘ who can adduce ocular proof from the scrip-
 ‘ ture-itself, having studied, as the law ordains,
 ‘ the *Vēdas* and their extended branches, or
 ‘ *Vēdāngas, Mīmāṃsā, Nyāya, Dhermaśāstra,*
 ‘ *Purānas:*

110. ‘ A point of law, *before not expressly re-*
 ‘ *vealed,* which shall be decided by an assembly
 ‘ of ten such virtuous *Brāhmens* under one chief,

‘ or, *if ten be not procurable*, of three such under one president, let no man controvert.

111. ‘ The assembly of ten under a chief
 ‘ *either the king himself or a judge appointed by*
 ‘ *him*, must consist of three, each of them peculiarly conversant with one of the three *Védas*,
 ‘ of a fourth skilled in the *Nyáya*, and a fifth in the *Mímáṃsā* philosophy; of a sixth, who
 ‘ has particularly studied the *Niručta*; a seventh,
 ‘ who has applied himself most assiduously to
 ‘ the *Dhermasástra*; and of three *universal scholars*, who are in the three first orders.

112. ‘ One, who has chiefly studied the *Rīg-véda*, a second, who principally knows the
 ‘ *Rajush*, and a third best acquainted with the
 ‘ *Sáman*, are the assembly of three under a head,
 ‘ who may remove all doubts both in law and
 ‘ casuistry.

113. ‘ Even the decision of one priest, *if*
 ‘ *more cannot be assembled*, who perfectly knows
 ‘ the principles of the *Védas*, must be considered
 ‘ as law of the highest authority; not the opinion
 ‘ of myriads, who have no sacred knowledge.

114. ‘ Many thousands of *Bráhmens* cannot
 ‘ form a legal assembly for the decision of contests, if they have not performed the duties of
 ‘ a regular studentship, are unacquainted with
 ‘ scriptural texts, and subsist only by *the name*
 ‘ of their sacerdotal class.

115. ‘ The sin of that man, to whom dunces,
 ‘ pervaded by the quality of darkness, propound
 ‘ the law, of which they are themselves igno-
 ‘ rant, shall pass, increased a hundredfold, to
 ‘ the wretches who propound it.

116. ‘ This comprehensive system of duties,
 ‘ the chief cause of ultimate felicity, has been
 ‘ declared to you; and the *Bráhmén*, who never
 ‘ departs from it, shall attain a superiour state
 ‘ above.

117. ‘ THUS did the allwise MENU, who
 ‘ possesses extensive dominion, and blazes with
 ‘ heavenly splendour, disclose to me, from his
 ‘ benevolence to mankind, this transcendant
 ‘ system of law, which must be kept devoutly
 ‘ concealed *from persons unfit to receive it.*

118. ‘ LET every *Bráhmén* with fixed atten-
 ‘ tion consider all nature, both visible and invi-
 ‘ sible, as existing in the divine spirit; for,
 ‘ when he contemplates the boundless universe
 ‘ existing in the divine spirit, he cannot give
 ‘ his heart to iniquity:

119. ‘ The divine spirit alone is the whole
 ‘ assemblage of gods; all worlds are seated in
 ‘ the divine spirit, and the divine spirit no doubt
 ‘ produces *by a chain of causes and effects consist-*
 ‘ *ent with free will,* the connected series of acts
 ‘ performed by imbodyed souls.

120. ‘ He may contemplate the subtil ether

‘ in the cavities of his body; the air in his
 ‘ muscular motion and sensitive nerves; the su-
 ‘ preme *solar and igneous* light, in his digestive
 ‘ heat and his visual organs; in his corporeal
 ‘ fluids, water; in the terrene parts of his fa-
 ‘ brick, earth;

121. ‘ In his heart, the moon; in his audi-
 ‘ tory nerves, the guardians of eight regions;
 ‘ in his progressive motion, VISHNU; in his
 ‘ muscular force, HARA; in his organs of
 ‘ speech, AGNI; in excretion, MITRA; in pro-
 ‘ creation, BRAHMA;

122. ‘ But he must consider the supreme
 ‘ omnipresent intelligence as the sovereign lord
 ‘ of them all, *by whose energy alone they exist; a*
 ‘ spirit, *by no means the object of any sense*, which
 ‘ can only be conceived by a mind *wholly ab-*
 ‘ *stracted from matter, and as it were* slumbering;
 ‘ but which *for the purpose of assisting his medi-*
 ‘ *tation*, he may imagine more subtil than the
 ‘ finest conceivable essence, and more bright
 ‘ than the purest gold.

123. ‘ Him some adore as transcendently
 ‘ present in elementary fire; others, in MENU,
 ‘ lord of creatures, *or an immediate agent in the*
 ‘ *creation*; some, as more distinctly present in
 ‘ INDRA, *regent of the clouds and the atmosphere*;
 ‘ others, in pure air; others, as the most High
 ‘ Eternal Spirit.

124. ‘ It is He, who, pervading all beings in
‘ five elemental forms, causes them by the
‘ gradations of birth, growth, and dissolution,
‘ to revolve in this world, *until they deserve beati-*
‘ *tude*, like the wheels of a car.

125. ‘ Thus the man, who perceives in his
‘ own soul the supreme soul present in all crea-
‘ tures, acquires equanimity toward them all,
‘ and shall be absorbed at last in the highest ef-
‘ fence, even that of the Almighty himself.’

126. HERE ended the sacred instructor; and
every twiceborn man, who, attentively reading
this *Mánava Sástra* promulgated by BHRĪGU,
shall become habitually virtuous, will attain the
beatitude which he seeks.

GENERAL NOTE.

THE learned *Hindus* are unanimously of opinion, that many laws enacted by *MENU*, their oldest reputed legislator, were confined to the three first ages of the world, and have no force in the present age, in which a few of them are certainly obsolete; and they ground their opinion on the following texts, which are collected in a work entitled *Mandana ratna pradīpa* :

I. *CRATU*: In the *Calī* age a son must not be begotten *on a widow* by the brother of the *deceased husband*; nor must a damsel, *once given away in marriage*, be given a *second time*; nor must a bull be offered in a sacrifice; nor must a waterpot be carried *by a student in theology*.

II. *VRIHASPATI*: I. Appointments of *kinship* to beget children on widows, or married women, when the husbands are deceased or impotent, are mentioned by the sage *MENU*, but forbidden by himself with a view to the order of the

four ages: no such act can be legally done in this age by any others *thàn the husband*.

2. In the first and second ages men were endowed with true piety and sound knowledge; so *they were* in the third age; but in the fourth, a diminution of their *moral and intellectual* powers was ordained *by their Creator*:

3. Thus were sons of many different sorts made by ancient sages, but such cannot now be adopted by men destitute of those eminent powers.

III. PARA'SARA: 1. A man, *who has held intercourse with a deadly sinner*, must abandon his country in the first age; he must leave his town, in the second; his family, in the third age; but in the fourth he needs only desert the offender.

2. In the first age, he is degraded by mere conversation with a degraded man; in the second, by touching him; in the third, by receiving food from him; but in the fourth, the sinner alone bears his guilt.

IV. NA'RADA: The procreation of a son by a brother *of the deceased*, the slaughter of cattle in the entertainment of a guest, the repast on fleshmeat at funeral obsequies, and the order of a hermit *are forbidden or obsolete in the fourth age*.

V. *A'ditya purána*: 1. What was a duty in the

first age must not *in all cases* be done in the fourth; since, in the *Cali yuga*, both men and women are addicted to sin :

2. Such are a studentship continued for a very long time, and the necessity of carrying a waterpot, marriage with a paternal kinswoman, or with a near maternal relation, and the sacrifice of a bull,

3. Or of a man, or of a horse: and all spirituous liquor must in the *Cali* age be avoided by twiceborn men; so must a second gift of a married young woman, *whose husband has died before consummation*, and the larger portion of an eldest brother, and procreation on a brother's widow or wife.

VI. *Smṛiti*: 1. The appointment of a man to beget a son on the widow of his brother; the gift of a young married woman to another bridegroom, *if her husband should die* while she remains a virgin;

2. The marriage of twiceborn men with damsels not of the same class; the slaughter, in a religious war, of *Brāhmens*, who are assailants with intent to kill;

3. Any intercourse with a twiceborn man, who has passed the sea in a ship, even though he have performed an expiation: performances of sacrifices for all sorts of men; and *the necessity of* carrying a waterpot;

4. Walking on a pilgrimage till the pilgrim die; and the slaughter of a bull at a sacrifice; the acceptance of spirituous liquor, even at the ceremony called *Sautrámani*;

5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained *for the first ages*;

6. The diminution of crimes in proportion to the religious acts and sacred knowledge *of the offenders*; the rule of expiation for a *Bráhma-men* extending to death;

7. The sin of holding any intercourse with sinners; the secret expiation of any great crimes except theft; the slaughter of cattle in honour of eminent guests or of ancestors;

8. The filiation of any but a son legally begotten or given in adoption *by his parents*; the desertion of a lawful wife for any offence less than actual adultery:

9. These *parts of ancient law* were abrogated by wise legislators, as the cases arose at the beginning of the *Cali* age, with an intent of securing mankind from evil.

On the preceding texts it must be remarked, that none of them, except that of *VRĪHASPATI*, are cited by *CULLU'CA*, who never seems to have considered any other laws of *MENU* as restrained to the three first ages; that the *Smṛiti*.

or sacred code, is quoted without the name of the legislator ; and that the prohibition, in any age, of *self-defence*, even against *Bráhmens*, is repugnant to a text of SUMANTU, to the precept and example of CRISHNA himself, according to the *Mabábbárat*, and even to a sentence in the *Véda*, by which every man is commanded to defend his own life from all violent aggressors.

Calcutta, March 1, 1794.

SIR,

THE Institutes of Hindu Law have been very correctly printed, and the whole impresson has just been sent to the Governor and Council, who will not fail to transmit copies for the King's library, for yourself, and for the Directors. If I had obtained his Majesty's leave to resign my office, nothing would now keep me here, but the Digest of Indian Laws, consisting of nine large volumes, two of which remain to be collated and studied with the learned Bráhmén, who assists me: he is old and infirm; but, should he be able to attend me another year, or two years at the very utmost, the whole work will be finished, and I shall copy it during my voyage, if the King shall graciously permit me to leave India.

I, therefore, intreat you, Sir, to lay before his Majesty, my humble supplication for his gracious permission to resign my judgeship in the year 1795, or (if the Digest should not then be completed) in 1796; it being my anxious wish to pass the remainder of my life in studious retirement, though devoted, as I ever have been,

to the service of my King and my Country, and of that recorded Constitution, which is the basis of our national glory and felicity.

I have the honour to be, Sir,
your very obedient
humble Servant.

The Right Hon. Henry Dundas, Esq.

THE
MAHOMEDAN LAW
OF
SUCCESSION
TO
THE PROPERTY OF INTESTATES.
IN
ARABICK,
ENGRAVED ON COPPER PLATES
FROM
AN ANCIENT MANUSCRIPT:
WITH
A VERBAL TRANSLATION, AND EXPLANATORY NOTES.

P R E F A C E.



NOTHING more seems necessary, in order to explain the object of the following work, than barely to cite the late statute concerning *the administration of justice in BENGAL*; by the *seventeenth* section of which it is enacted, “ That
 “ the Supreme Court of Judicature at *Fort Wil-*
 “ *liam* shall have full power to *hear and deter-*
 “ *mine* all manner of actions and suits against
 “ the inhabitants of *Calcutta*, provided that
 “ their *inheritance and succession to lands, rents,*
 “ *and goods*, and all matters of contract and
 “ dealing between party and party, shall be
 “ determined, *in the case of* Mahomedans, *by*
 “ *the laws and usages of* MAHOMEDANS, and,
 “ where only *one* of the parties shall be a Ma-
 “ homedan, by the laws and usages of *the de-*
 “ *pendant* :” by the *twenty-first* section, the *pro-*
 “ vincial courts of *Adálet*, or *Justice*, are expressly
 recognised, and the powers of the governor and
 council, as the *Sedr Adálet*, in determining civil

causes on appeals from those courts, are fully established in conformity to the old *Mogul* constitution.

But it may naturally be asked, how the judges of the Supreme Court, the provincial councils and council general, in *India*, or the great court of appeal in this kingdom, can justly exercise their several powers in suits between *Mahomedan* parties, without being at all acquainted with the law, by which they are bound to decide. Perpetual references to native lawyers must always be inconvenient and precarious; since the solidity of their answers must depend on their integrity, as well as their learning; and at best, if they be neither influenced nor ignorant, the court will not in truth *bear and determine* the cause, but merely pronounce judgement on the report of other men.

For these reasons it appears indubitable, that a knowledge of *Mahomedan* jurisprudence (I say nothing here of the *Hindû* learning,) and consequently of the *languages* used by *Mahomedan* writers, are essential to a complete administration of justice in our *Asiatick* territories; a knowledge I mean, though not equal to that of the *MUFTI* at *Constantinople*, yet sufficient for the purpose of keeping a check over the native counsellors, of understanding and examining their opinion, and of rejecting or adopting it, as

it may be opposed or supported by their books of allowed authority, to which they should constantly refer.

A considerable number of those books have been brought to *England* by the curious in different ages, and are now repositied in our Academical libraries: in the *Bodleian*, especially, we have many treatises and dissertations in *Arabic* on *wills, inheritances, contracts*, and other important heads; particularly in the fine collection made at *Aleppo* by the learned Pocock, from one of whose most valuable manuscripts (n. 33.) this little work has been traced through transparent paper, and engraved with such accuracy, that the plates must have equal authority in *Asia* with the original pages, which are near *five hundred years* old.

The author, a native of *Alrahaba*, in *Mesopotamia*, was himself an IMAM; and his decisions are, on that account, considered as binding by the sect of *Ali*, which the *Indian*, as well as the *Persian*, Mahomedans profess; but IBNO'LMOTAKANNA informs us, that he drew his knowledge from the fountain head, and has epitomised the system of *Zaid*, who was recommended by MAHOMED himself as the surest interpreter of his laws, and who had been implicitly followed by SHAFIEI, the first writer on *Mahomedan* jurisprudence, in the *eightb* cen-

tury of our era, and composer of the *Osûl*, or *Principles* of law, with other tracts highly valued by the learned of his religion and country.

Hence it is certain, that the *Bigyato'l bâhitb* may be cited, as a book of authority, in all the *Musleman* courts; and the *European* reader must not be surprised, to see such a work written in a kind of loose metre, and even in rhyme: *a lawtract in verse* conveys, indeed, rather a ludicrous idea, since poetry belongs to *imagination*, which law, whose province is pure *reason*, wholly excludes; but *verse*, as numberless instances prove, *is not always poetry*; and a regular measure is so considerable an aid to the *memory*, that, if the *metrical abridgement* of COKE'S *Reports* were more accurate, and the couplets a little smother, every student should be advised to get it by heart. I may add, without enlarging upon the *Agatbyrsi* and the *Turdetani*, who, as we are told by *Aristotle* and *Strabo*, had *laws in verse of the remotest antiquity*, that the ALCORAN itself, the great source of *Mahomedan* law, is composed in sentences not only modulated with art, but often exactly rhymed; so that in *Asia* this apology would have been needless. Verbal translations are generally naked and insipid, wholly destroying all the neatness and beauty of the original, yet retaining so much of the foreign idiom and manner, as to appear

always uncouth, often ridiculous ; but elegance, on a subject so delicate as law, must be sacrificed without mercy to exactness ; and for this reason I have rendered the *Arabian* treatise, line for line, and word for word, with a fidelity almost religiously scrupulous.

As it was never my intention to compose a perfect work upon the law of inheritances among the *Mahomedans*, it cannot be reasonably expected, that I should subjoin a commentary, or prefix a long discourse : very few marginal notes were thought necessary ; but, if the brevity of the original should make parts of it rather obscure, the *British* lawyers in *India*, for whose use chiefly this production was designed, will easily obtain a clear explanation both of the language and matter from native interpreters.

The *fourth* chapter of the *Alcoran* may throw light, if any be wanted, on the doctrine of the *forûdb* or *portions* ; and, as to the *arithmetical* part, it seems of little consequence, as our rules of *three*, and those for the reduction of *fractions*, are common and familiar to all.

The present publication will answer, I conceive, another purpose by no means unimportant ; as it will habituate the student of eastern languages to the reading of old *Arabian* manuscripts ; but, lest the hand-writing of the very learned *Saad Al Sivâsi*, for that was the name

of the transcriber, should perplex beginners, I have printed the whole tract, for their sake, in *Roman* letters, distinguishing every consonant and *long* vowel (the *short* ones are too vague and indeterminate) by a character invariably appropriated to it; so as to give every full sound its own specifick symbol; an advantage, which hardly any alphabet has, but which all ought to have.

**Bigyah'o 'lbáhhithi ân jumali 'lmowáarithi
nadh'mo 'lshaíkhi álimámi álâálimi
mowáfíki 'ldeíni ábeí âbdillahi
mohammedi 'bni âleí íbni 'lhhofaíni
álrahhabiyyi álmárúfi bi 'bni 'l
motakannah'i rahhamaho állaho taâálaí.**

**Bismi 'llahi álahhmani álahheími wabihi
neftaéino.**



[1]

áwwalo má neftastihho 'lmekálá
bidhicri hhamdi rabbiná taâálá
fálhhamdo lillahi âlaí má ánâamá
hhamdán' bihi nejlúá âni 'lâini 'lâamá
thomma áls'alwah'o bâdo wálsalámo
âlaí nebiyyin' deínoho álíflamo
mohammedin' khátimi rufli rábbihi
waálihi min bâdihí was'ahhbihi
wanefalo 'llaha liná 'líáánah'a
feímá tawakhkhaíná min álibánah'a
ân medh-hebi 'límámi zaídi 'lfaradh'ei
ídh cána dháca min áhammi 'lgaradh'i
îlmán' biánna 'lílmo áúfá má foêi
feíhi waáúlá má leho 'lábdo doêi
waánna hadhá 'lílma makhs'ús'on' bimá
kad sháâa feíhi înda culli rûlemá
waánna zaídán' khus'sa lá mahhálah
bimá hhabáho s'áhhibo 'lrisálah
min kaúlibi feí fadh'lihi monabbehá

áfradh'acom zaidon wanáheica behá
 facána áulaí be-íttibái 'ltábî
 lá fiyyamá wakat nahháho 'lsháfîi
 faháca feíhi álkaúla bi'leíjazi
 mobarraán' min kas'mah'i 'lalgázi
 ásbábo meíráthi 'lwaraí theláthah
 cullon yofeido rabbaho 'lwiráthah
 wahaí nicáhhon' waweláon' wanafab
 má bádahonna lilmawáreíthi sabab.

[2]

wayamnaô 'lshakhs'a min álmeíráthi
 wáhhidah'on' min îlalin' theláthi
 rikkon' wakatlon' waákhtiláfo deíni
 faáfham falaífa 'lshacco cályakeíni
 wálwáarithúno feí 'lrijáli ásharah
 ásmáwahom mârúfah'on' mushtaharah
 álíbno wa'bno 'lîbni mahmá nazalá
 wa'lábo wa'ljeddo leho wa'î'n âlá
 wálákho min áyyi 'ljeháti cáná
 kad ánzela 'llaho bihi 'lkorána
 wábno 'lákhi 'lmodleí ílaíhi bi'lábi
 fâsmâ mekálán' laífa bi'lmucadhdhabi
 wa' lámmo wábno 'lâmmi min ábeíhi
 fâshcor ledheí 'leíjazi wáltanbeíhi
 wálzaújo wálmôtiko dhú 'lwelái
 fajumlah'o 'ldhucúri hawolái
 wálwáaritháto cullohinna febô
 lam yáth'i ónthéi gáirahonna 'lsherô

binton' wabinto 'bnin waommon' mushfikah
 wajaddah on wazaujah on wamôtikah
 wál khto min ayyi 'ljeháti canat
 fahadhihi îddatohá kad bánat
 waálam biáanna 'lirtha nauááni homa
 fardh'on wataseíbon álaí ma kofimá
 fálfardho fei nassí 'lcitábi sittah
 lá fardho feí 'lirthi fiwáhá bittah
 nisfon warubôn thomma nisfo 'lrubî
 wálthultho walsudfo binas'sí 'lsherî
 wálthulthani wahoma altemamo
 fáhhfadh" facullo hháfídh' in' ímamo

[3]

fálnisfo fardho khamfáh'in' áfrádi
 álzaujo wálonthai min álauládi
 wawinto 'lîbni înda fakdi 'lbinti
 walákhto fei medh-hebí culli muster
 wabâdaha 'lákhto 'llati min alabi
 înda anfiradihinna min moâs'síbi
 walrubô fardha 'lzauji in cana maâh
 min waladi lzaujah'i men kad menaâh
 wahú leculli zaujah in' áú ácthera
 má ádami 'láuladi feímá kadderá
 walthomno lilzaujah i wálzaujati
 ma álbeneina au má álbenáti
 áú maa auladi 'lbeneini fáálemeí
 wábek le-ít kari 'ldurufi waslemeí
 waálthúlthani lilbenati jemáá

má zâda ân wâhhidah'î fâsemââ
 wahúa cadháca lebenáti 'lîbni
 fâfham mekáleí fahma s'âfeí 'ldhihni
 wahúa liákhtaíni femá yezeído
 kadh'ái bihi 'lâhbráro wâlâbeído
 hadhá ídhá cunna liómmei waábi
 áu liábi fáâmel bihadhá tos'ibi
 wálthultho fardh'o 'lómmei hhaítho lá weled
 wela mina 'lâkhwah'î jemô waâded
 cáthnaíni áu thintaíni áu theláthi
 hocmo 'ldhucúri feíhi cálináthi
 waín yecun zaújon' waómon' waábo
 fathultho 'lbakíyo lehá morattabo
 wahacadhaí mâ zaújah'in' fas'âidá
 felá tecun mina 'lûlûmi kâidá

[4]

wálthultho liláthnaíni áu thintaíni
 min weledi 'lómmei bigaíri maíni
 wahacadhaí ín catharúá farádúá
 fema lehom feímá fiwáho zâdo
 wataftawaí 'línátho wáldhucúro
 feíhi camá kad áúdh'ahho 'lmeft'húro
 wálsudfo fardh'o febâh'in' mina 'lâded
 ábon' waómmon' thomma binto'bni wajedd
 wálókhto binto 'lábi thomma 'ljeddah
 waweledo 'lómmei temámo 'liddah
 fálabo yestahhikkoho mâa 'lweled
 wahacadhaí 'lómmei betenzeíli 'ls'emed

wahú lehá áydh'án' máa 'láthnaíni
 min íkhwah'i 'lmaíti fakis hadhaíni
 wáljeddo mithlo 'lábi înda fakdihi
 feí jeza má yes'eíboho wameddihi
 illá ídhá cána honáca íkhwah
 licaúnahom feí 'lkurbi wahú áfwah
 wahhucmohim wahhucmoho seyáteí
 mocammela 'lbayána feí 'lhháláti
 wabinto 'líbni tákhodh álfudfa ídhá
 çánat máa 'lbintì mithálá yahhtadhaí
 wahacadhaí 'lókhto máa 'lókhti 'llataí
 biálábawaini yá ókhayyo ádlata
 faí'n tefáwaí nefebo 'ljeddáti
 wacunna cullahonna wáaritháti
 fálfudfo bainahonna biálfawiyyah
 feí 'lkismah i 'láádilah i 'lsherîyyah
 wacullo men ádlat bigairi wáarithi
 femá lehá hhadh"dh"on' mina 'lmawáarithi.

[5]

watafkotho 'lbôdaí bidháti 'lkurbi
 feí 'lmedh-hebi 'láúlaí fakol leí hhasbeí
 wakad tenáhat kismah'o 'lforúdh'i
 bigairi ífhcáli welá gomúdh'i
 wahhokka án neshraâ feí 'ltás'eíbi
 biculli kaúlin' mújizin' mus'eíbi
 facullo men áhhraza culla 'lmáli
 mina 'lkarábáti áú álmawáleí
 áú cána má yafdh'olo bâda 'lfardh'i leh
 fahu ákhú 'lâs'úbah i 'lmofadh dh'aleh.

cálábi wáljeddi wajeddi 'ljeddi
 wálíbní înda kurbihi walbôdi
 wálakhi wábni 'lákhi wálââmâmi
 wálfayyidi 'lmôtiki dheí 'línââmi
 wahacadhaí benúohom jemeiâân
 facun lemá ádhcoroho semeiâân
 wamá ledheí 'lbôdi mâa 'lkareíbi
 feí 'lírthi min hhadh dh in wela neseíbi
 wálákho wálâmmo liómmín' waábi
 áúlaí mina 'lmodleí biſhath'ri 'lnafabi
 wa'libno wálákho mâa 'línáthi
 yoâs'sîbánahinna feí 'lmeíráthi
 walaíſa feí 'lnifáí th'urrán' âs'abah
 illá 'llataí mennat bi îtki 'lrakabah
 wálákhawáto ín yecun benáto
 fahonna bâdahonna âs abáto
 wa'ljeddo mahhjúbón' âni 'lmeíráthi
 bi'lábi feí áhhwálihi 'ltheláthi
 wahacadhaí 'bno 'libni bi'libni felá
 tabig âni 'lhacmi 'lfáhheihhi mâdilá

[6]

wataſkoth'o 'ljeddáto min culli jihch
 bi 'lómmi fáhhfadh"-ho wakis má áſhbeheh
 wataſkoth'o 'líkhwah'o bi'lbeneiná
 wabi'lábi 'ládnaí camá ruweiná
 áú bibeneí 'lbeneína hhaítho cánúá
 fiyyáni feíhi 'ljemâ wa'lwahhdáno
 wayafdh'olo'bno 'lómmi bi'líſkáthi
 bi'ljeddi fáhhfadh"-ho álaí ihhtiyáthi

wabi 'lbenáti wabenáti 'lúbni
 facun bihhifdh"i 'lilmi jiddán' mônei
 thomma benáto 'lúbni yeskoth'na metaí
 hháza 'lbenáto álhulthaína yá fetaí
 íllá ídhá âs's'abahonna áldhacaro
 min welidi 'lúbni âlaí má dhacarúá
 wabâdahonna 'lâkhawáto 'llátaí
 yodleína bi'lkurbi min áljiháti
 ídhá ákhádna fardh'áhonna wáfiyá
 áfkath na áuláda 'lâbi 'lbawáciyá
 waín yecun ákho lehonna hhádh'írán'
 ââs'abahonna bathínán' wadh"ahirán'
 walaífa íbno'lákhi bi'lmoâs's'abi
 men mithlaho áú faúkaho feí 'lnafabi
 waín tajid zaúján' waómmán' wáarithá
 waíkhwah'an' lilómmi hházúá 'lthulothá
 waákhwah'an' áydh án' liómmi waábi
 waástugrika 'lmálo bifardh'i 'lnos'obi
 fájâlahomo cullohomo liómmi
 waáhhfíb ábáhom hhajarán' feí 'lyammi
 wáksim âlaí 'líkhwah'i thultha 'ltaric'ah
 wahadhihi 'lmeselah'q 'lmushtaracah

[7]

wálána nebdá bi'lladhaí áradná
 feí 'ljeddi wa'líkhwah'i ídh waádná
 faálik nahhaú má ákúlo 'lmismaâá
 wájmâ hhawásheí 'lcelamáti ájmaâá
 wáâlem biánna 'ljeddo dhú áhhwáí

ònbeíca ànhonna álaí 'ltawáleí
 fakáfimo 'líkhwah'í feíhonna ídhá
 lam yaôdi 'lkafmo álaíhi bi'ládhai
 fatárah'an' yákhodho thulthán' cámilán'
 ín cána bi'lkísmah'r ànho názilán'
 ín lam yecun feíhim dhawú fihámi
 fákna bíáyd'háhheí àni ístífhámi
 watárah'an' yákhodho thultha 'lbákeí
 bâda dhawéí 'lforúdh'í wa'lárzáki
 hadhá ídhá má ádh'-hhati 'lmokásamah
 tenkos'ho àni dháci bi'lmezáhhamah
 watárah'an' yákhodho sudfa 'lmáli
 walaísa ànho názilán' bihháli
 wahaú mâa 'línáthi înda 'lkafmi
 mithlo ákhin' feí fahmihi wa'lhhocmi
 wáhhfcb beneí 'lábi ledaí 'lîdádi
 wárfodh' beneí 'lómmei mâa 'lájdádi
 wáhhcom álaí 'líkhwah'í bâda 'lâddi
 hhocmaca feíhim înda fakdi 'ljeddi
 wálókhto lá fardh'o mâa 'ljeddi lehá
 feíma álá meselah'an' cammalehá
 zaújon' waómmon' wahomá temámohá
 fâalem fakháiro ómmah'in állámohá
 tôrafo yá s'áhhi bi'lácdariyyah
 waheí bián tahhfádh'o-há hhariyyah

[8]

fayofradh'o 'lnisfo lehá wa'lsudfo leh
 hhataí tâúli bi'lforúdh'í 'lmojmcleh
 thomma yaûúdáni ílaí 'lmokásameh

camá madh'ái fáhhfadh"-ho wáfhcor nádh"imeh
 wá'n torid mārifah'a 'lhhifábi
 letentahái feíhi ílaí 'ls'awábi
 watârifo 'lkismah'a wa'ltafs'eílá
 watâlim áls'ahheíhha wa'lós'úla
 fástakhrijí 'lós'úla feí 'lmesáyili
 walá tecun ân hhifdh"ihá bidbáhili
 wahaí ídhá fos's'íla feíhá 'lkaúlo
 thelethah'on' yedkholo feíhá 'láúlo
 wabâdahá árbaâh'on' temámo
 lá âúla yâruhâ welá ínthilámo
 fálsudfo min fittah'í ás-homin' terá
 wálthultho wa'lrubô min áthnaí áshará
 wálthumno ín dh'omma ílaíhi 'lsudfo
 faás'loho 'ls'ádiko feíhi 'lhhadfo
 árbaâh'on' yatbaôhá íshruná
 yârifohá 'lhhufábo ájmaûúná
 fahadhihi 'lthelethah'o 'lós'úlo
 ín caththorat forúdh'ohá taûúlo
 fatablogo 'lfittah'o ákda 'láshareh
 feí s'úrah'in' mârúfah'in' mustath'areh
 watalhhako 'llataí teleíhá feí 'láthar
 feí 'láúli áfrádán' besebâh'í áshar
 wa'lâdado 'lthálitho kad yaûúlo
 bithumnihi fáâmel bimá ákúlo
 wa'lnis'fo wa'lbakeí áwi'lnis'fáni
 ás'lohomá feí hucmihom áthnání

[9]

wa'lthultho min thelethah'in yecuno
 wa'lrubô min árbaâh'in' mefnúno
 wa'lthumno in cána famin themániyah
 fahadhihi hai 'lós'úlo 'lthániyah
 lá yedkholo 'lâúlo alaíhá fáâlemi
 thomma áfloca 'ltás'-hheíhi feíhá wákfimi
 fai'n tēcun min ás'lihá tas'ihhhho
 fatarco tath'weili 'lhhifábi ribhho
 fáâth'i cullán' fahmaho min ás'li
 mocammilán' aú ááyilán' min áúlihi
 waïn terai 'lfiháma laífa tankafim
 âlai dhawei 'lmeiráthi fátbâ má rufim
 wáthlob th'areíka 'líkhtisári fei 'lâmal
 bi'ldh'arbi wa'lwafki yojánibca 'lzelel
 wárdod ilai 'lwafki 'lladhai yowáfiko
 wádh'ribho fei 'lâs'li waánta 'lhhádiko
 in cána jinfán' wáhhidán' áú áçtherá
 fahhfadh" wadâ áncia 'ljidála wa'lmirá
 waïn terai 'lcathra âlai ájnâfi
 fai'nnahá fei 'lhucmi înda 'lnâfi
 tohhs'aro fei árbaâh'in' ákfâmi
 yârifohá 'lmáhiro fei 'lâhhcâmi
 momáthilon' min bâdiho monásibo
 wabádaho mowáfikon' mos'ahhibo
 wa'lrábiô 'lmobáyino 'lmokhálifo
 yonbéica ân tafs'eílihinna 'láárido
 fakhodh mina 'lmomáthilaini wáhhidá

wakhodh mina 'lmonáfibaíni 'lzáyidá
 wakhodh jemeíâ 'ládadi 'lmobáyini
 wadh'ribho feí 'ltháneí welá todáhini

[10]

wádh'rib jemeíâ 'lwafki feí 'lmowáfiki
 wáfloc bidháca ánhaja 'lth'aráyiki
 wádh'ribho feí 'lás'li 'lladhaí taás'sílá
 waáhh'si má ándh'amma wamá tahhas's'alá
 waák'fimho fa'lka'fma ídhá s'ahheí'hho
 yârifoho 'láâjemo wa'lfas'eí'hho
 fahadhihi mina 'lhhifábi jumalo
 yáteí âlaí mithálihinna 'lâmalo
 min gáiri tath'weílin' welá 'átisáfi
 fáknâ bimá feíhinna fahú cáfi
 waï'n yemut ákharo kabla 'lkismah
 fahhakkiki 'lfihámi wáârif kismah
 wájâl leho mesalah'an' ókhraí lemá
 kad bayyana 'ltafs'eíla feímá koddimá
 wándh'or faï'n wáfakati 'lfihámo
 fakhodh hodeíta wafkohá temámo
 wádh'ribho áú jemeíâhá feí 'lsábikah
 ín lam yecun baínahomá mowáfakah
 fálás-homo 'lókhraí fafeí 'lfihámi
 todh'rebo áú feí wafkihá temámi
 wacullo sahmin' feí jemeíu 'lthániyah
 yodh'rebo áú feí wafkihá âlániyah
 fahadhihi th'areíkah'o 'lmonáfakhah
 fárka bihá rutbah'a fadh'li shámikhah

waïn yecun fei mustahhakki 'lmáli
khonthain' s'ahheíhhon bayyana 'líshcáli
fákfim álaí 'lákalli wa'lyekeíni
tahhdh" a bihakki 'lkismah'i 'lmobeíni
wahacadhaí hucmo dhawáti 'lhhamli
yobnaí álaí 'lyekeíni wa'lákalli

[11]

waïn yemut kaúmon' bihadmin' áu garak
áu hhádithin' ámma 'ljemeíá ca'lhharak
walam yecun yôlemo hhálo 'lfábiki
falá yowarrath náfikon' min náfiki
taôddohom caínnahom ájánibo
wahacadhaí 'lráyyo 'lfadeído 'ls'áyibo
wakad átaí 'lkaúlo álaí má sheíná
min kismah'i 'lmeíráthi ca yebeíná
álaí th'areíki 'lramzi wa'líshárah
molakhkhas'án' biáújezi 'libárah
fa'lhhamdo lillahi álaí 'ltemámi
hhamdán' catheírán' tomma fei 'ldawámi
wanafalo 'láfwa áni 'ltaks'eíri
wakhaíra má námolo fei 'lmes'eíri
wagafra má cána mina 'ldhonúbi
wafatra má cána mina 'lôyúbi
waáfdh'alo 'ls'alwah'i wa'ltalleími
álaí 'lnobiyyi 'lmus'th'afai 'lcereími
mohammedín' khaíri 'lánámi 'lâákibí
waálihi 'lgurri dhawef 'lmenákibi
was'ahhbihi 'láfadh'ili 'lábrári

áls'ifwah'i 'lámáthili 'lákhyári
 wahhafboná 'llaho wanîma 'lcáfeí
 dhú 'lîzzi wa'lkodrah'i wa'lálth'áfi

tummat wa'lhhamdo lillahi
 rabbi 'láálemeíni was'alwátoho
 wafelámoho álaí fayyidiná
 mohammedin' ánebiyyi 'lómmiyi
 waâlaí álihi was'ahhbihi
 álh'ayyibeíni álh'ahereíni
 laílah'o 'ljemaáh liárbaái liyáli
 khalaúna min shewáli finnah
 áthnei áshari wasebá máyih'i
 yetheki bi'llahi taâálaí
 fakhro 'lsábikáncí
 áfá 'llaho áneho.

**THE DESIRED OBJECT OF THE INQUIRER
CONCERNING ALL THE RULES OF INHERITANCE:**

Composed by the learned *Shaikh*, the *Imám*

Mowaffiko'ddein, father of *Abdalla*,

Mohammed, son of *Ali*, son of *Hosain*,

Al Rahabi, commonly called *Ibno'l*

Motakanna. . May God be merciful to him !

In the name of God, the Clement, the Merciful : and
from Him we seek assistance.

[1]

FIRST, we open the discourse

With pronouncing the praise of our Lord most High :

Praise then to GOD for what he hath bestowed,

Praise, by which we remove blindness from the sight !

Next, benediction afterwards and salutation

To the Prophet, whose religion is the ISLA'M,

MOHAMMED, seal of his Lord's messengers,

And his family, after him, and his friends !

And let us pray GOD for his aid to us

In what we have proposed to explain

From the system of the Imám, ZAID ALFARADHI *,

(Since this is among the noblest of purposes)

By learning ; for learning is the most deserving of efforts

In it, and the worthiest vocation of the pious ;

And this *branch* of knowledge peculiarly belongs to what

Has been openly declared among all the learned ;

And ZAID has unquestionably a just title

To what the lord of the mission conferred on him,

By pronouncing his excellence, clearly saying,

" ZAID will teach you the law : " O glorious encomium !

He, therefore, best deserves to be followed by the student,

Especially since SHAFIEI takes him for a guide.

This then is his doctrine epitomised

* *Faradhi*, a man skilled in the *fará'idhi*, or *sacred ordinances* contained in the Alcoran.

Free from a particle of ambiguity.

The causes of inheritance among men are three ;

(The possessor of any one has the advantage of succession)

And they are wedlock, collateral relation, and descent :

There is not besides them a single cause of inheritance.

[2]

And any one of three incapacities

Excludes a person from the succession ;

Servitude, and homicide, and a difference of faith :

Understand then ; since doubt is not like certainty.

And those, who inherit among males, are ten ;

Their names are known, and every where mentioned :

The son, and the son's son, however they descend,

And the father, and his father, in the ascending line ;

And the brother, on whichever side he stands,

Since GOD caused the KORAN to descend in his favour ;

And the son of a brother related by the same father,

(Hear now the discourse containing no falsehood)

And the paternal uncle, and such uncle's son,

(Be thankful to him, who explains concisely and clearly)

And the husband, and the emancipator nearly connected ;

And all the males, *who inherit*, are these.

And all the inheriting females are seven,

(To no woman, but them, does the law give that title)

The daughter, and the son's daughter, and the tender
mother,

And the grandmother, and the wife, and the emancipatress,

And the sister, on whichever side she stands :

And this their number *thus* appears.

And know, that inheritance is of two sorts, which *are*

The SHARE, and the HEIRSHIP * of what is distributable.

Now the shares, by the declaration of the book, are six :

(Besides them *is* no share in the inheritance)

* Pronounced in India, *ferz* and *usba*. See the last words of the report by the *Muhammedan* doctors in the *Patna* cause.

A moiety, and a fourth; next, half a fourth,
 And a third, and a sixth, as the law declares,
 And two thirds; and these *are* the whole.
 Remember then; for "Every one, who remembers, is
 an IMAM*."

[3]

A moiety then *is* the share of five persons,
 The husband, and the female child,
 And the daughter of a son, on failure of daughters,
 And the *whole* sister, by the opinion of every MUFTI,
 And, after her, the sister, who has the same father;
This when they stand alone without any HEIR.
 And a fourth *is* the share of the husband, if there be with
 him
 Any children of the wife, who deprive him of *more*;
 And this *is* for every wife, or more *than one*
 On failure of children, as it is ordained.
 And the eighth *is* for the wife, or the wives,
 Together with sons or with daughters †,
 Or with children of sons: learn then,
 And remain firm in venerating study, and prosper.
 And two thirds are for the daughters all together,
 When there are more than one; (hear attentively)
 And the same *portion is* for the daughters of a son:
 (Comprehend my discourse with clear discernment)
 This also *is* for two sisters, and for what exceeds *that*
number;
 The ingenuous and the pious have thus decided:
 This, whether they be by the father and the mother,
 Or by the father *only*. (Act by this *rule*; thou wilt be right)
 And the third *is* the mother's share, when *there is* no child,

* A saying, I believe, of Mahomed: he meant a rememberer of his oral precepts. Hence the name of *Hafidh*, or *Hafiz*, was assumed by many illustrious persons, and, among them, by the celebrated poet.

† See the answer of Mohammed Kásim to the thirteenth question proposed to him in the *Patna* cause.

And thus a sister with a sister, who
 Is related, O my brother, by the same father.
 And, if the relation of the grandmothers be equal,
 Both of them are called to the succession ;
 And a sixth *is divided* between them equally
 By the just *and* the legal *mode of* partition.
 And every female, who claims through one not inheriting,
 Has herself no portion of the inheritance.

[5]

And the distant kinswoman is excluded by the near
 By the better opinions : (say now to me, " Enough.")
 And *here* ends the distribution of the SHARES,
 Without perplexity or intricacy :
 And *it is* just, that we propound the law of HEIRSHIP
 With every sentence concise *and* exact.
 Now every one, who appropriates all the estate,
 Among the near descendants or relations,
 Or who takes what remains after the portions,
 He is distinguished by the title of HEIR*,
 As the father, and the grandfather, and his father,
 And the son, in a near and a remote degree,
 And the brother, and the brother's son, and the uncles,
 And the master, who generously manumitted *his slave*.
 And thus their sons, all of them :
 {Be attentive then to what I pronounce).
 And *there is not* to the distant, with the near, kinsman
 Any share or portion in the inheritance.
 And the brother and the uncle by mother, and father
 Are preferred to those descended by the half blood.
 And the son and the brother with females
 Have the heirship over them in the estate :

* See *A Narrative of the Proceedings in the Patna Cause*, p. 11. Note b.
 The Arabick verb *ds'saba* primarily signifies to collect and bind together the
 branches of a tree: hence the secondary sense, to constitute the heir and head
 of a family.

And there is not among women any heiress
 Except her, who kindly freed the *enslaved* neck.
 And the sisters, if there be daughters,
 Take the residue after their portions.
 And the grandfather is precluded from inheriting
 By the father in *all* his three cases;
 And thus the grandson by the son: (do not then
 Turn aside, in deviation from the clear rules).

[6]

And the grandmothers on each side are excluded
 By the mother: (remember this *rule*, and decide conform-
 ably)
 And brothers are excluded by sons
 And by the nearest progenitor, as we are taught;
 Or by sons' sons, when there are *any*;
 A number and one are in this respect alike.
 And the mother's son remains in exclusion
 By the grandfather (remember this with care)
 And by the daughters, and the son's daughters:
 (Be very assiduous in committing knowledge to memory)
 Besides, the son's daughters are excluded, when
 The daughters take two thirds, O young man,
 Except when a male has the heirship over them
 Of the son's children, by what they assert:
 And, after them, the sisters, who
 Descend in proximity from *both* sides,
 When they take their complete portions,
 Exclude the weeping daughters of the *dead* father;
 And, if they have a brother present,
 He has the heirship over them, in private and publick,
 And the brother's son is not the heir over
 Whoever is equal to, or above, him in descent.
 And, if thou find a husband and a mother inheriting,
 And brothers by the mother, they take *each* a third;
 And so *if there be* brothers by the mother and the father,

And the whole estate is comprised in the allotment of shares,
 Place them all to *the side of the mother*,
 And consider their father as a rock in the sea,
 And divide among the brethren a third of the estate left,
 And this is the case of *mushtaraca*, or parcenary.

[7]

And now we will enter upon what we desire
 Concerning the grandfather and the brothers, as we promised.

Incline then thine ear to what I shall say,
 And collect at once the whole purport of my words;
 And know, that the grandfather has *different cases*;
 I will inform thee of them successively:
 And he has a share with the brothers in them, when
 The division redounds not to any loss upon him.
 And sometimes he takes an entire third,
 If there be in the distribution any descendants from him,
 And there be not among them any entitled to shares,
 (Be content with my explanation without questions)
 And sometimes he takes a third of the remainder
 After those, who have portions and provisions;
 This, when the dividend is become
 Too diminished for the other *share* by the press of
claimants.

And sometimes he takes a sixth of the property,
 And there is no descendant from him in *that case*;
 And he, with females in the division, is
 Like the brother in his share and his right.
 And reckon the father's children in the number,
 (And leave the mother's children with the grandfathers)
 And, after that number, give to the brethren
 Thy just allotment among them on failure of the grand-
 father.

And the sister has no share with the grandfather
 In what exceeds the case already concluded;
 The consort and the mother, and these two are all of
 them,

(Know then, for the best of the sect is he who knows best)
 Are called, O friend, the *acdariyyah* * ;
 And they deserve to be remembered by thee.

[8]

Half then is given to her, and a sixth to him,
 Until there is a remainder after the entire shares,
 Then they return to the distribution
 As before-mentioned: (recollect it, and thank the author)
 And, if thou desire a knowledge of computation,
 Thou wilt by its means attain the right proceeding :
 And thou wilt understand divisions and analysis,
 And wilt be acquainted with integers and fractions ;
 Extract then the roots in *solving* problems †,
 And be not remiss in committing them to memory ;
 Now they, when the discourse about them is precise,
 Are three, to which a remainder belongs,
 And, after them, four complete *divisors*,
 'To which no remainder belongs, nor any fraction ‡.
 Now the sixth, thou wilt see, is from six portions,
 And the third and the fourth from twelve ;
 And if to an eighth a sixth be added,
 The *new* root, concerning which the calculation is just,
Becomes four, which twenty follow,
 As arithmeticians universally know §.
 And these three roots,
 If the shares be many, leave a remainder.
 And let six come to the connexion of ten
 In the known table commonly delineated ¶,

* The *Arabian* lexicographers give this name to the *husband* or *wife*, the *mother*, the *grandfather*, and the *whole* sister ; possibly, because the rules of succession are a little disturbed in favour of them.

† By *√*, or *root*, he must mean the *denominator* of a fraction.

‡ He, probably, considers the whole estate as *twelve*, which has *four* divisors, besides unit.

§ In our notation (which the *Arabicists*, if they are wise, will adopt),

$$\frac{1}{2} + \frac{1}{3} = \frac{5}{6}$$

¶ This passage I do not understand, not knowing the table to which

And let that follow, which succeeds it in the series,
 In the excess, by distinct progressions, to seventeen;
 And the third number leaves a remainder
 Of its eighth part: (proceed then, as I direct)
 And half and what remains, or the two halves,
 Their root, in the rule concerning them, is two.

[9]

And the third comes *obviously* from three;
 And the fourth is formed from four;
 And the eighth, if it be *required*, is from eight;
 And these are the second roots,
 To which no remainder belongs: know this;
 Then pursue the method of verifying it, and distribute:
 And, if thou hast verified the root,
 The end of lengthened computation is clear gain.
 Give then to each person his share, from his root,
 Complete, or broken from its remainder.
 And, if thou see that the shares cannot be distributed
 To the partakers of the inheritance, follow what is pre-
 scribed,
 And seek the way of compendiousness in the work
 By multiplication and proportion: this will remove error
 from thee,
 And restore to the whole quantity what agrees with it,
 And multiply it by the root, and be thou vigilant;
 Whether there be one denomination or more,
 Remember well, and dismiss from thee doubt and difficulty:
 And, if thou see multiplicity in the kinds,
 Then they, by the rule among men,
 Are numerically ranged in four terms,
 The skilful *accountant* will know them by the rules;
 The similar *term*, after it the proportional,

it refers. The *sexagenary table*, which *Wallis* exhibits in the seventh chapter of his *Algebra*, is commonly used in *Asia* for multiplication and division. See CHARDIN, vol. III. p. 155.

And, after that, the concordant accompanying,
 And the fourth is the discordant separated ;
 (The intelligent man will inform thee of their distinctions)
 Take then from the similars one,
 And take from the proportionals the rest,
 And take the entire number of discordants,
 And multiply them by the second *term* ; and be not
 deceived.

[10]

And, mix the whole quantity with the concordant,
 And pursue by it the plainest of ways ;
 And multiply it into the root, which thou hast investigated.
 And compute what is the sum, and what it amounts to ;
 And divide it ; and, if the division be just,
 The illiterate and the eloquent man will equally know it * :
 And this is the whole of the computation,
 (The work thus proceeds in similar cases)
 Without prolixity or digression ;
 Be satisfied then with what it contains ; for it is sufficient †,
 And if one person die before the distribution,
 Make the shares just, and know his *proper* division ;
 And state for him a fresh question, as it
 Has been distinctly explained, in what precedes :
 And consider ; and, if the shares agree,
 Take them ; thou art right ; the quantity is complete ;
 And mix it, or all of them, into the preceding,
 If there be not an agreement between them,

* The preceding verses contain an awkward rule of *practics* ; but it hence appears, that *Chardin* was mistaken, when he asserted, that neither the *Indians* nor *Persians* of his time were at all acquainted with the common *practical rules* : see his chapter on the *Persian Arithmetick*.

† It can only be of use, as an artificial memory, to those who already know the rules, but is insufficient for the teaching of them. These two or three pages are very enigmatical ; but I should not despair of explaining them, if I had leisure to read a few arithmetical books of the *Arab*: or *Persians*.

And the new shares into the *former* shares
 Are blended, or into the entire quantity;
 And every share into the aggregate of the second
 Is mixed, or into the whole quantity, manifestly:
 And this is the method of *monásakhah**;
 Mount then by it the lofty degrees of excellence.
 And, if there be among the claimants of the estate
 A real hermaphrodite, removing *all* doubts,
 Distribute to the less *evident* and to the certain;
 Thou wilt allot with justice the clear portion;
 And this is the rule of pregnant women,
 Which is founded on the certain, and the less *evident*.

[11]

And, if many kinsmen die by ruin or drowning,
 Or a calamity overwhelming all, as fire,
 And the case of the survivor be not known,
 And one deceased cannot be heir to another deceased,
 Reckon them *all*, as if they were strangers;
 And this is the sound and true determination.
 And now the discourse has come to what we desired
 Concerning the distribution of estates, so that it is made
 clear,
 By way of short hint and allusion,
 Explained in an abbreviation of the sense.
 Praise then to GOD in perfection,
 Praise, abundant, complete in eternity;
 And let us ask forgiveness for our defects,
 And the best of what we hope in the place aspired to,
 And pardon for what is passed of our sins,
 And a covering for what is passed of our faults;
 And the fairest of salutations and benisons

* The grammarians, translated by Golius, thus explain the word *monásakhah* or *monasakhah*: "Mors et successio continua hæredum, quæ sit
 'Integrâ manente et indivisâ hæreditate;" but the last words convey
 no adequate idea of the thing.

On the prophet, the pure, the illustrious,
 MOHAMMED, the best of created beings, the last of *prophets*,
 And on his family, bright with glorious qualities,
 And his companions, the excellent, the noble,
 The spotless, the exalted, the beneficent !
 And our sufficient help is GOD ! O all-sufficient !
 Endued with greatness, and with power, and with clemency !

The work is ended. Praise be to GOD,
 The ruler of worlds ! and his blessing
 And peace on our lord
 MOHAMMED, the Unlettered Prophet,
 And on his family and his companions,
 The excellent, the unblemished !
 On Friday night, one of the four nights
 at the close of *Shewāl* in the year
 seven hundred and twelve *

The Transcriber, surnamed
 FAKHRO'L SA'BKA'NI
 (or, Excelling his Predecessors)
 confides in GOD Most High :
 May GOD forgive his sins !

AL SIRĀJĪY YĀH:

OR,

**THE MOHAMMEDAN LAW OF
INHERITANCE;**

WITH

A COMMENTARY,

BY

SIR WILLIAM JONES.

■

■

THE
P R E F A C E.

THE two *Muselman* authors, whom I now introduce to my countrymen in *India*, are *Shaikh SIRA'JU'DDI'N*, a native of *Sejāvend*, and *Sayyad SHARIF*, who was born at *Jurjān* in *Khwārezm* near the mouth of the *Oxus*, and is said to have died, at the age of seventy-six years, in the city of *Shirāz*: their compositions have equal authority in all the *Mohammedan* courts, which follow the system of *ABU' HANI'FAH*, with those of *LITTLETON* and *COKE* in the courts at *Westminster*; and there is, indeed, a wonderful analogy between the works of the old *Arabian* and *English* lawyers, and between those of their several commentators; with this difference in favour of our own country, that *LITTLETON* is always too clear to need a gloss, and with this difference in favour of the *Arabs*, that the sole object of *SHARIF* was to explain and illustrate his text, without an ostentatious dis-

play of his own erudition; but, when it is admitted, that a desire of extreme brevity has often made the *Sirâjiyyah* obscure, the reader should in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system, which he unfolds to his countrymen, has no resemblance to any other, that the world ever knew. In the *Sbarîfiyyah* (for that is the popular title of the *Arabian* comment) we find little or no obscurity; and, if there be a fault in the book, it is a scrupulous minuteness of explanation, and a needless anxiety to remove every little cloud, which the reader himself might disperse by the slightest exertion of his intellect. Both works were translated into *Persian* by the order of Mr. HASTINGS; and the translation, which bears the name of *Maulavi MUHAMMED KA'SIM*, must appear excellent, and would be really useful, to such as had not access to the *Arabick* originals; but the text and comment are blended without any discrimination, and both are so intermixed with the notes of the translator himself, that it is often impossible to separate what is fixed law from what is merely his own opinion: he has

also erred (though it be certainly a pardonable error) on the side of clearness, and has made his work so tediously perspicuous, that it fills, inclusively of a turgid and flowery dedication, about six hundred pages, and a faithful version of it in *English* would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as possible, be measured by the size of it, they must be thought very inconsiderable; but in truth no greater pains could have been taken with any work; and it would have been a far easier task to have dictated or written a verbal translation of the two comments on my text, than to have made a careful selection of all that is important in them; for which purpose I perused each of them three times with the utmost attention, and have condensed in little more than fifty short pages the substance of them both, without any superfluous passage, that I should wish to be retrenched, and with as much perspicuity as I was able to give, in so short a compass, to a system in some parts rather abstruse: lest men of business, for whom the book is intended, should be alarmed at first sight by the magnitude of it, I have omitted all the minute criticism, various readings, and curious *Arabian* literature; most of the anecdotes concerning old

lawyers, and all their subtil controversies with the arguments on both sides ; together with the demonstrations of arithmetical rules and the very long processes, after the prolix method of the *Arabs*, in words instead of figures. Practical utility being my ultimate object in this work, I had nothing to do with literary curiosities, how agreeable soever they might have been in their proper places ; but, in order to attain that object by a full explanation of every thing useful in my text, I was under a necessity of retaining the *Arabian* phraseology both in law and arithmetick, and must request the *English* reader to dismiss from his mind, while he studies the *Sirâjiyyah*, those appropriated senses, in which many of our words, as *heir*, *inheritance*, *root*, and the like, are used in our own systems. One *Arabick* word I was at a loss to translate precisely in our language without circumlocution : the chief problem, in the distribution of estates among *Muselman* heirs, is to find the least number, by which an estate must be divided, so that all the shares and the residue may be legally distributed without a fraction: this they call *integration* ; but, if I could have hazarded such a word in *English*, the frequent repetition of it would have been extremely harsh ; and I have generally called it *arrangement* or *verification*, which are popular senses of the *Arabick* verbal noun ;

but the number fought, or, to use the *Arabian* expression, *the integrant of the case*, I have usually named the *divisor* of the estate.

It will be seen in the *Sirâjiyyah*, that the system of ZAID, though in part exploded by ABU HANÍFAH, had very powerful supporters, and its author is always mentioned in terms of respect: it is the system, which I published at *London* above ten years ago; and I am not surprised, that, without a native assistant or even a marginal gloss, I could not then interpret the many technical words, which no dictionary explains, except in their popular senses; but, though my literal version of the tract by ALMUTAKANNA seems for pages together like a string of enigmas, yet the following work makes every sentence in it perfectly clear; and the original, which was engraved from a very old manuscript, appears to be a lively and elegant epitome of the law of inheritance according to ZAID, but manifestly designed to assist the memory of young students, who were to get it by heart, when they had learned the rules from some longer treatise, or from the mouths of their preceptors. This may be no improper place to inform the reader, that, although ABU HANÍFAH be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown to ABU YUSUF and the lawyer MUHAMMED, that, when

they *both* dissent from their master, the *Muselman* judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason, and founded on the better authority.

I am strongly disposed to believe, that no possible question could occur on the *Mohammedan* law of succession, which might not be rapidly and correctly answered by the help of this work; but it would be easy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if necessary, represent each of the sharers, residuaries, and distant heirs; and let those letters be the initials of the several words, in aid of the memory, but so chosen (as without difficulty they may be) that all may be different; let them be placed in alphabetical order, and connected by the sign of addition; let an enumeration be then made, by the known rule, of all the possible cases, in which they can occur, two and two, three and three, and so forth; let them accordingly be arranged in tables from the lowest number to the highest; and let the share or allotment of each be set above the letter, in the place of an exponent. If the question then were proposed, in what manner the property of HINDA must be distributed among her daughter, her sister by the same father only, and the daughter of her son, the table of the third

class would exhibit this formula $D \frac{3}{5} + DF \frac{3}{5} + DS \frac{1}{5}$; or, if AMRU had left his wife, two daughters, and both his parents, the formula in the fourth table would be $2 D \frac{1}{17} + F \frac{1}{17} + M \frac{1}{17} + W \frac{3}{17}$; where the denominator of the index would be the *integrant*, as the *Arabs* call it, of the case, and the numerator would point out the several allotments: thus might we construct a set of tables, mathematically accurate, in which the legal distribution, in every possible case, might be seen in a moment without thought and even without learning; and such a blind facility, though not very consistent with the dignity of science, would certainly be convenient in practice. We might also arrange the whole in a synthetical method (of all the most luminous and satisfactory) by beginning with the sentences of the *Koràn*, as with indubitable axioms, followed by the genuine oral *maxims* of MUHAMMED; by subjoining the *points*, on which all the learned have at length agreed, and by concluding with *cases* deduced from those three sources of juridical knowledge, to which there should be constant references by numbers in the manner of geometers: this method I propose to adopt in the Digest, from which I have separated the *Sirâjiyyah*, because it seemed worthy of being exhibited entire, and may be considered as Institutes of Arabian Law on the important title, mentioned by the *British*

legislature, of *inheritance and succession to lands, rents, and goods.*

Unless I am greatly deceived, the work, now presented to the public, decides the question, which has been started, *whether, by the Mogul constitution, the sovereign be not the sole proprietor of all the land in his empire, which he or his predecessors have not granted to a subject, and his heirs*; for nothing can be more certain, than that land, rents, and goods are, in the language of all *Mohammedan* lawyers, *property alike alienable and inheritable*; and so far is the sovereign from having any right of *property* in the goods or lands of his people, that even escheats are never appropriated to his use, but fall into a fund for the relief of the poor. SHARIF expressly mentions *fields and houses* as inheritable and alienable property: he says, that a *house*, on which there is a lien, shall not be sold to defray even funeral expenses; that, if a man dig a well *in his own field*, and another man perish by falling into it, he incurs no guilt; but, if he had trespassed on *the field of another man*, and had been the *occasion* of death, he must pay the price of blood; that *buildings and trees* pass by a sale of *land*, though not conversely; and he always expresses what we call *property* by an emphatical word implying *dominion*. Such *dominion*, says he, may be acquired by the act of *parties*, as in the case of *contracts*, or, by the act of

law, as in the case of descents; and, having observed, that freedom is the civil existence and life of a man, but slavery, his death and annihilation, he adds, because freedom establishes his right of property, which chiefly distinguishes man from other animals and from things inanimate; so that he would have considered subjects without property (which, as he says in another place, comprises every thing that a man may sell, or give, or leave for his heirs) as mere slaves without civil life: yet SHARIF was beloved and rewarded by the very conqueror, from whom the imperial house of Dehli boasted of their descent. The Koràn allots to certain kindred of the deceased specifick shares of what he left, without a syllable in the book, that intimates a shade of distinction between realty and personalty; there is therefore no such distinction, for interpreters must make none, where the law has not distinguished: as to MUHAMMED, he says in positive words, that if a man leave either property, or rights, they go to his heirs; and SHARIF adds, that an heir succeeds to his ancestor's estate with an absolute right of ownership, right of possession, and power of alienation. Now I am fully persuaded, that no Muselman prince, in any age or country, would have harboured a thought of controverting these authorities. Had the doctrine lately broached been suggested to the ferocious, but politick and religious.

OMAR, he would in his best mood have asked his counsellor sternly, whether he imagined himself wiser than God and his Prophet, and, in one of his passionate fallies, would have spurned him as a blasphemer from his presence, had he been even his dearest friend or his ablest general: the placid and benevolent ALI would have given a harsh rebuke to such an adviser; and AURANGZÍB himself, the bloodiest of assassins and the most avaricious of men, would not have adopted and proclaimed such an opinion, whatever his courtiers and slaves might have said, in their zeal to aggrandize their master, to a foreign physician and philosopher, who too hastily believed them, and ascribed to such a system all the desolation, of which he had been a witness. Conquest could have made no difference; for, either the law of the conquering nation was established in *India*, or that of the conquered was suffered to remain: if the first, the *Koràn* and the *dicta* of MUHAMMED were fountains, too sacred to be violated, both of public and private law; if the second, there is an end of the debate; for the old *Hindus* most assuredly were absolute proprietors of their land, though they called their sovereigns Lords of the Earth; as they gave the title of Gods on Earth to their *Bráhmens*, whom they punished, nevertheless, for *theft* with all due severity. Should it be urged, that, although an

Indian prince may have no right, in his *executive* capacity, to the land of his subjects, yet, as the sole *legislative* power, he is above control; I answer firmly, that *Indian* princes never had, nor pretended to have, an unlimited legislative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of dispensing.

I am happy in an opportunity of advancing these arguments against a doctrine, which I think unjust, unfounded, and big with ruin; for, in the course of nine years, I have seen enough of these provinces and of their inhabitants, to be convinced, that, if we hope to make our government a blessing to them and a durable benefit to ourselves, we must realize our hope, not by wringing for the present the largest possible revenue from our *Asiatick* subjects, but by taking no more of their wealth than the publick exigencies, and their own security, may actually require; not by diminishing the *interest*, which landlords must naturally take in *their own soil*, but by augmenting it to the utmost, and giving them assurance, that it will descend to their heirs: when their laws of property, which they literally hold *sacred*, shall in practice be secured to them; when the land-tax shall be so moderate, that they cannot have a colourable pretence to rack their tenants, and

when they shall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergence, which may endanger all they possess; when either the performance of every legal contract shall be enforced, or a certain and adequate compensation be given for the breach of it; when no wrong shall remain unredressed, and when redress shall be obtained at little expense, and with all the speed, that may be consistent with necessary deliberation; then will the population and resources of *Bengal* and *Bahar* continually increase, and our nation will have the glory of conferring happiness on considerably more than *twenty-four* millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose firm attachment will secure the permanence of our dominion.

AL SIRAJIYYAH.

THE
INTRODUCTION.

IN THE NAME OF THE MOST MERCIFUL GOD!

PRAISE *be* to GOD, the Lord of *all* worlds; the praise of those who give *Him* thanks! And *His* blessing on the best of created beings, MUHAMMED, and his excellent family! The Prophet of GOD (on whom be his blessing and peace!) said: "Learn the laws of inheritance, "and teach them to the people; for they *are* "one half of useful knowledge." Our learned in the law (to whom GOD be merciful!) say: "There belong to the property of "a person deceased four successive duties *to* "be performed by the magistrate: first, his funeral ceremony and burial without superfluity "of expense, yet without deficiency; next, the

“ discharge of his just debts from the whole of
“ his remaining effects; then the payment of
“ his legacies out of a third of what remains
“ after his debts *are* paid; and, lastly, the distri-
“ bution of the residue among his successors, ac-
“ cording to the Divine Book, to the Traditions,
“ and to the Assent of the Learned.” They
begin with the persons entitled to shares, who
are such as have each a specifick share allotted
to them in the book of Almighty GOD; then
they proceed to the residuary heirs by relation,
and they are all such as take what remains of
the inheritance, after those who are entitled to
shares; and, if there be only residuaries, they
take the whole property: next to residuaries for
special cause, as the master of an enfranchised
slave and his *male* residuary heirs; then they
return to those entitled to shares according to
their respective rights of consanguinity; then to
the more distant kindred; then to the successor
by contract; then to him who was acknow-
ledged as a kinsman through another, so as not
to prove his consanguinity, provided the de-
ceased persisted in that acknowledgement even
till he died; then to the person, to whom the
whole property was left by will; and lastly to
the publick treasury.

On Impediments to Succession.

IMPEDIMENTS to succession are four; 1, servitude, whether it be perfect or imperfect; 2, homicide, whether punishable by retaliation, or expiable; 3, difference of religion; and 4, difference of country, either actual, as between an alien enemy and an alien tributary; or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states: now a state differs from another by having different forces and sovereigns, there being no community of protection between them.

On the Doctrine of Shares, and the Persons entitled to them.

THE *furud*, or shares, appointed in the book of Almighty GOD, are six: a moiety, a quarter, an eighth, two thirds, one third, and a sixth, *some formed by doubling, and some by halving.* Now those entitled to these shares are twelve persons; four males, who are the father and the true grandfather or other male ancestor, how high soever *in the paternal line*, the brother by the same mother, and the husband; and eight

females, who are the wife, and the daughter, and the son's daughter, or other female descendant how low soever, the sister by one father and mother, the sister by the father's side, and the sister by the mother's side, the mother, and the true grandmother, that is, she who is related to the deceased without the intervention of a false grandfather. (A false male ancestor is, where a female ancestor intervenes in the line of ascent.) The father takes in three cases; 1, an absolute share, which is a sixth, and that with the son, or son's son, how low soever; 2, a legal share, and a residuary portion also; and that with a daughter, or a son's daughter, how low soever in the degree of descent; 3, he has a simple residuary title, on failure of children and son's children, or other low descendants. The true grandfather has the same interest with the father, except in four cases, which we will mention presently, if it please GOD; but the grandfather is excluded by the father, *if he be living*; since the father is the mean of consanguinity between the grandfather and the deceased. The mother's children also take in three cases: a sixth is the share of one only; a third, of two, or of more: males and females have an equal division and right; but the mother's children are excluded by children of the deceased and by son's children,

how low soever, as well as by the father and the grandfather; as the learned agree. The husband takes in two cases; half, on failure of children, and son's children, and a fourth, with children or son's children, how low soever they descend.

On Women.

WIVES take in two cases; a fourth *goes* to one or more on failure of children, and son's children how low soever; and an eighth with children, or son's children, in any degree of descent. Daughters begotten by the deceased take in three cases: half goes to one only, and two thirds to two or more; and, if there be a son, the male has the share of two females, and he makes them residuaries. The son's daughters are like the daughters begotten by the deceased; and they may be in six cases: half goes to one only, and two thirds to two or more, on failure of daughters begotten by the deceased; with a single daughter of the deceased, they have a sixth, completing (*with the daughter's half*), two thirds; but, with two daughters of the deceased, they have no share of the inheritance, unless there be, in an equal degree with, or in a lower degree than, them, a boy, who makes

them residuaries. As to the remainder between them, the male has the portion of two females; and all of the son's daughters are excluded by the son himself.

If a man leave three son's daughters, some of them in lower degrees than others, and three daughters of the son of another son, some of them in lower degrees than others, and three daughters of the son's son of another son, some of them in lower degrees than others, as in the following table, this is called the case of *tashbib*.

FIRST SET.

Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter,

SECOND SET.

Son,
|
Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter,

THIRD SET.

Son,
|
Son,
|
Son,
|
Son, Daughter,
|
Son, Daughter,
|
Son, Daughter.

Here the eldest of the first line has none equal in degree with her; the middle one of the first line is equalled in degree by the eldest of the second; and the youngest of the first line is equalled by the middle one of the second, and by the eldest of the third line; the youngest

of the second line is equalled by the middle one of the third line, and the youngest of the third set has no equal in degree.—When thou hast comprehended this, then we say: the eldest of the first line has a moiety; the middle one of the first line has a sixth together with her equal in degree to make up two thirds; and those in lower degrees never take any thing, unless there be a son with them, who makes them residuaries, both her who is equal to him in degree, and her who is above him; but who is not entitled to a share: those below him are excluded.

Sisters by the same father and mother may be in five cases: half goes to one alone; two thirds to two or more; and, if there be brothers by the same father and mother, the male has the portion of two females; and the females become residuaries through him by reason of their equality in the degree of relation to the deceased; and they take the residuc, when they are with daughters, or with son's daughters, by the saying of Him, on whom be blessing and peace! “Make sisters, with daughters, residuaries.”

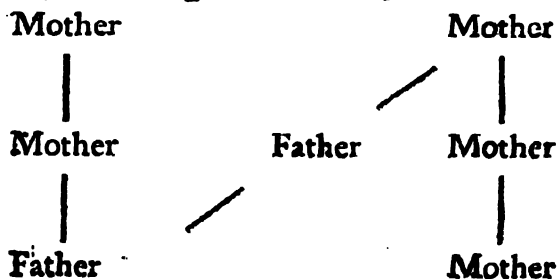
Sisters by the same father only are like sisters by the same father and mother, and may be in seven cases: half goes to one, and two thirds to two or more on failure of sisters by the same father and mother; and with one sister by

the same father and mother, they have a sixth, as the complement of two thirds; but they have no inheritance with two sisters by the same father and mother, unless there be with them a brother by the same father, who makes them residuaries; and then the residue is *distributed* among them *by the sacred rule* "to the male" "what is equal to the share of two females." The sixth case is, where they are residuaries with daughters or with son's daughters, as we have before stated it.

Brothers and sisters by the same father and mother, and by the same father only, are all excluded by the son and the son's son, in how low a degree soever, and by the father *also*, as it is agreed *among the learned*, and even by the grandfather according to ABU HANIFAH, on whom be the mercy of ALMIGHTY GOD! And those of the half-blood are also excluded by the brothers of the whole blood.

The mother takes in three cases: a sixth with a child, or a son's child, even in the lowest degree, or with two brothers and sisters or more, by whichever side they are related; and a third of the whole on failure of those just-mentioned; and a third of the residue after the share of the husband or wife; and this in two cases, either when there are the husband and both parents, or the wife and both parents: if there be a

grandfather instead of a father, then the mother takes a third of the whole property, though not by the opinion of ABU YUSUF, on whom be GOD's mercy! for he says, that in this case also she has only a third of the residue. The grandmother has a sixth, whether she be by the father or by the mother, whether alone or with more, if they be true grandmothers and equal in degree; but they are all excluded by the mother, and the paternal female ancestors also by the father; and in like manner, by the grandfather, except the father's mother, even in the highest degree; for she takes with the grandfather, since she is not *related* through him. The nearest grandmother, or *female ancestor*, on either side, excludes the more distant grandmother, on whichever side she be; whether the nearer grandmother be entitled to a share of the inheritance, or be herself excluded. When a grandmother has but one relation, as the father's mother's mother, and another has two such relations, or more, as the mother's mother's mother, who is also the father's father's mother, according to this table,



then a sixth is divided between them, according to ABU YUSUF, in moieties, respect being had to their persons; but according to MUHAMMED (on whom be GOD's mercy!) in thirds, respect being had to the sides.

On Residuaries.

RESIDUARIES by relation *to the deceased* are three: the residuary in his own right, the residuary in another's right, and the residuary together with another. Now the residuary in his own right is every male, in whose line of relation to the deceased no female enters; and of this sort there are four classes; the offspring of the deceased, and his root; and the offspring of his father and of his nearest grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceased are his sons *first*; then their sons, in how low a degree soever: then *comes* his root, or his father; then his paternal grandfather, and their paternal grandfathers, how high soever; then the offspring of his father, or his brothers; then their sons, how low soever; and then the offspring of his grandfather, or his uncles: then their sons, how low soever. Then the strength

of consanguinity prevails: I mean, he, who has two relations is preferable to him, who has only one relation, whether it be male or female, according to the saying of Him, on whom be peace! "Surely, kinsmen by the same father and mother shall inherit before kinsmen by the same father only;" thus a brother by the same father and mother is preferred to a brother by the father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the father only; and the son of a brother by the same father and mother is preferred to the son of a brother by the same father only; and the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The residuaries in another's right are four females; namely, those whose shares are half and two thirds, and who become residuaries in right of their brothers, as we have before mentioned in their different cases; but she who has no share among females, and whose brother is the heir, doth not become a residuary in his right; as in the case of a paternal uncle and a paternal aunt.

As to residuaries together with others: such is every female who becomes a residuary with

another female; as a sister with a daughter, as we have mentioned before. The last residuary is the master of a freedman, and then his residuary heirs, in the order before stated; according to the saying of Him, on whom be blessing and peace! "The master bears a relation like "that of consanguinity;" but females have nothing among the heirs of a manumittor, according to the saying of Him, on whom be blessing and peace! "Women have nothing "from their relation to freedmen, except when "they have themselves manumitted a slave; or "their freedman has manumitted one, or they "have sold a manumission to a slave, or their "vendee has sold it to his slave, or they have "promised manumission after their death, or "their promisee has promised it after his death, "or unless their freedman or freedman's freedman draw a relation *to them*."

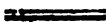
If the freedman leave the father and son of his manumittor, then a sixth of the right over the property of the freedman vests in the father, and the residue in the son, according to *ABU YUSUF*; but, according to both *ABU HANIFAH* and *MUHAMMED*, the whole right vests in the son; and, if a son and a grandfather of the manumittor be left, the whole right over the freedman goes to the son, as all the learned agree. When a man possesses as his slave a

kinsman in a prohibited degree, he manumits him, and his right vests in him; as if there be three daughters, the youngest of whom has twenty *dinàrs*, and the eldest, thirty; and they two buy their father for fifty *dinàrs*; and afterwards their father die leaving some property; then two thirds of it are divided in thirds among them, as their legal shares, and the residue goes in fifths to the two who bought their father; three fifths to the eldest and two fifths to the youngest; which may be settled by dividing the whole into forty-five parts.

On Exclusion.

EXCLUSION is of two sorts: 1. *Imperfect*, or an exclusion from one share, and an admission to another; and this takes place in respect of five persons, the husband or wife, the mother, the son's daughter, and the sister by the same father; and an explanation of it has preceded. 2. *Perfect* exclusion: there are two sets of persons having a claim to the inheritance: one of which sets is not excluded entirely in any case; and they are six persons, the son, the father, the husband, the daughter, the mother, and the wife; but the other set inherit in one case and in another case

are excluded. This is grounded on two principles; one of which is, that "whoever is related to the deceased through any person, shall not inherit, while that person is living;" as a son's son, with the son; except the mother's children, for they inherit with her; since she has no title to the whole inheritance: the second principle is, "that the nearest of blood must take," and who the nearest is, we have explained in the chapter on residuaries. A person incapable of inheriting doth not exclude any one, *at least* in our opinion; but, according to IBNU MASUUD (may GOD be gracious to him!) he excludes imperfectly; as an infidel, a murderer, and a slave. A person excluded may, as all *the learned* agree, exclude *others*; as, *if there be* two brothers or sisters or more, on which ever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth.



On the Divisors of Shares.

KNOW, that the six shares mentioned in the book of Almighty GOD are of two sorts: of the first are a moiety, a fourth, and an eighth; and of the second sort are two thirds, a third, and a sixth, as the fractions are halved and

doubled. Now, when any of these shares occur in cases singly, the divisor for each share is that number which gives it its name (except half, which is from two), as a fourth denominated from four, an eighth from eight, and a third from three: when they occur by two or three, and are of the same sort, then each integral number is the proper divisor to produce its fraction, and also to produce the double of that fraction, and the double of that, as six produces a sixth, and likewise a third, and two thirds; but, when half, *which is* from the first sort, is mixed with all of the second sort or with some of them, then *the division of the estate must be* by six; when a fourth is mixed with all of the second sort or with some of them, then the division must be into twelve; and when an eighth is mixed with all of the second sort, or with some of them, then it must be into four and twenty parts.



On the Increase.

AUL, or *increase*, is, when some fraction remains above the *regular* divisor, or when the divisor is too small to admit one share. Know, that the whole number of divisors is seven, four

of which have no increase, namely, two, three, four, and eight; and three of them have an increase. The *divisor*, six, is, therefore, increased by the *ául* to ten, either by odd, or by even, numbers; twelve is raised to seventeen by odd, not by even, numbers; and twenty-four is raised to twenty-seven by one increase only; as in the case, called *Mimberiyya* (or a case answered by ALI when he was in the pulpit), which was this, “*A man left a wife, two daughters, and both his parents.*” After this there can be no increase, except according to IBN MASÚÚD (may GOD be gracious to him!) for, in his opinion, the divisor twenty-four may be raised to thirty-one; as *if a man leave a wife, his mother, two sisters by the same parents, two sisters by the same mother only, and a son rendered incapable of inheriting.*



*On the Equality, Proportion, Agreement, and
Difference of two Numbers.*

THE *temáthul* of two numbers is the equality of one to the other; the *tedákhul* is, when the smaller of two numbers exactly measures the larger, or exhausts it; or we call it *tedákkul*, when the larger of two numbers is divided ex-

actly by the smaller; or we may define it thus, when the larger exceeds the smaller by one number or more equal to it, or equal to the larger; or it is, when the smaller is an aliquot part of the larger, as three of nine. The *ta-wáfuk*, or agreement, of two numbers is, where the smaller does not exactly measure the larger, but a third number measures them both, as eight and twenty, each of which is measured by four, and they agree in a fourth; since the number measuring them is the denominator of a fraction common to both. The *tabáyun* of two numbers is, when no third number whatever measures the two discordant numbers, as nine and ten. Now the way of knowing the agreement or disagreement between two different quantities is, that the greater be diminished by the smaller quantity on both sides, once or oftener, until they agree in one point; and if they agree in unit only, there is no numerical agreement between them; but, if they agree in any number, then they are (*said to be*) *mutawáfik* in a fraction, of which that number is the denominator; if two, in half; if three, in a third; if four, in a quarter; and so on, as far as ten; and, above ten, they agree in a fraction; I mean, if the number be eleven, the fraction of eleven, and, if it be fifteen, by the fraction of fifteen. Pay attention to this *rule*.

On Arrangement.

IN arranging cases there is need of seven principles; three, between the shares and the persons, and four between persons and persons. Of the three *principles* the first is, that, if the portions of all the classes be divided among them without a fraction, there is no need of multiplication, as *if a man leave* both parents and two daughters. The second is, that, if the portions of one class be fractional, yet there be an agreement between their portions and their persons, then the measure of the number of persons, whose shares are broken, must be multiplied by the root of the case, and its increase, if it be an increased case, as *if a man leave* both parents and ten daughters, or *a woman leave* a husband, both parents, and six daughters. The third *principle* is, that, if their portions leave a fraction, and there be no agreement between those portions and the persons, then the whole number of the persons, whose shares are broken, must be multiplied into the root of the case, as *if a woman leave* her husband and five sisters by the same father and mother. Of the four *other principles* the first is, that, when there is a fractional division between two classes or more, but an equality between the numbers

of the persons, then the rule is, that one of the numbers be multiplied into the root of the case; as if *there be* six daughters, and three grandmothers, and three paternal uncles. The second is, when some of the numbers equally measure the others; then the rule is, that the greater number be multiplied into the root of the case; as, *if a man leave* four wives and three grandmothers and twelve paternal uncles. The third is, when some of the numbers are *mutawâfik*, or composit, with others; then the rule is, that the measure of the first of the numbers be multiplied into the whole of the second, and the product into the measure of the third, if the product of the third be *mutawâfik*, or, if not, into the whole of the third, and then into the fourth, and so on, in the same manner; after which the product must be multiplied into the root of the case: as, *if a man leave* four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles. The fourth *principle* is, when the numbers are *mutabâyan*, or not agreeing one with another; and then the rule is, that the first of the numbers be multiplied into the whole of the second, and the product multiplied by the whole of the third, and that product into the whole of the fourth, and the last product into the root of the case; as, *if a*

man leave two wives, six female ancestors, ten daughters, and seven paternal uncles..

Section.

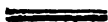
WHEN thou desirest to know the share of each class by arrangement, multiply what each class has from the root of the case by what thou hast already multiplied into the root of the case, and the product is the share of that class; and, if thou desirest to know the share of each individual in that class by arrangement, divide what each class has from the principle of the case by the number of the persons in it, then multiply the quotient into the multiplicand, and the product *will be* the share of each individual in that class. Another method is, to divide the multiplied number by whichever class thou thinkest proper, then to multiply the quotient into the share of that set, by which thou hast divided the multiplied number, and the product *will be* the share of each individual in that set. Another method is by the way of proportion, which is the clearest; and it is, that a proportion be ascertained for the share of each class from the root of the case to the number of per-

sons one by one, and that, according to such proportion from the multiplied *number*, a share be given to each individual of that class.

*On the Division of the Property left among Heirs
and among Creditors.*

If there be a disagreement between the property left and the *number arising from the arrangement*, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement, but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement into the measure of the property, and divide the product by the measure of the *number arising from the arrangement*: the quotient is the portion of that heir in both methods. This *rule* is in order to know the portion of each individual among the heirs; but, in order to know the portion of each class of them, multiply what each class has, according to the root of the case, into the measure of the property left, then divide the product by the measure of the case, if there be an agreement be-

tween the property left and the case; but, if there be a disagreement between them, then multiply into the whole of the property left, and divide the product by the whole *number arising from the* verification of the case; and the quotient *will be* the portion of that class in both methods. Now, as to the payment of debts, the debts of all the creditors stand in the place of the arranging number.



On Subtraction.

WHEN any one agrees to take a part of the property left, subtract his share from *the number arising* by the proof, and divide the remainder of the property by the portions of those who remain; as *if a woman leave* her husband, her mother, and a paternal uncle: now *suppose that* the husband agrees to take what was in his power of his bridal gift to the wife; this is deducted from among *the heirs*: then what remains is divided between the mother and the uncle in thirds, according to their legal shares; and thus there will be two parts for the mother, and one for the uncle.

On the Return.

THE return is the converse of the increase; and it *takes place* in what remains above the shares of those entitled to them, when there is no legal claimant of it: this *surplus* is returned to the sharers according to their rights, except the husband or the wife; and this is the opinion of all the *Prophet's* companions, as ÂLI and his followers, may GOD be gracious to them! And our masters (to whom GOD be merciful!) have assented to it: ZAID, the son of THA'BIT says, that the surplus doth not revert, but *goes* to the publick treasury; and to this opinion have assented ÛRWAH and ALZUHRI' and MA'LIC and ALSHA'FI', may GOD be merciful to them!

Now the cases on this head are *in* four divisions: the first of them *is*, when there is in the case but one sort of kinsmen, to whom a return must be made, and none of those who are not entitled to a return: then settle the case according to the number of persons; as, when the deceased has left two daughters, or two sisters, or two female ancestors; settle it, therefore, by two. The second *is*, when there are joined in the case two or three sorts of those, to whom a return must be made, without any of those, to

whom there is no return: then settle the case according to their shares; I mean by two, if there be two sixths in the case; or by three, when there are a third and a sixth in it; or by four, when there are a moiety and a sixth in it; or by five, when there are in it two thirds and a sixth, or half and two sixths, or half and a third. The third *is*, when in the first case, there is *any one* to whom no return can be made: then give the share of him or her, to whom there is no return, according to the lowest *denominator*, and if the residue exactly quadrate with the number of persons, who are entitled to a return, *it is well*; as *if there be* a husband and three daughters; but, if they do not agree, then multiply the measure of *the number* of the persons, if there be an agreement between the number of persons and the residue, into the denominator of the shares of those, to whom no return is to be made: as *if there be* a husband, and six daughters; if not, multiply the whole number of the persons into the denominator of the share of those, to whom there is no return; and the product will set the case right. The fourth is, when, in the second case, there are any to whom no return is made: then divide what remains from the denominator of the share of him or them, who have no return, by the case of those, to whom a re-

turn must be made, and, if the remainder quadrate, *it is well*; and this *is* in one form; that is, when a fourth *goes* to the wives, and the residue is *distributed* in thirds among those entitled to a return; as *if there be* a wife, and a grandmother, and two sisters by the mother's side: but, if it do not quadrate, then multiply the whole case of those, who are entitled to a return, into the denominator of the share of him or her, who is not entitled to it; and the product will be the denominator of the shares of both classes; as *if there be* four wives, and nine daughters, and six female ancestors: then multiply the shares of those, to whom no return must be made, into the case of those, who are entitled to a return, and the shares of those, to whom a return is to be made, into what remains of the denominator of the share of those, who are not entitled to a return. If there be a fraction in some, adjust the case by the before-mentioned principles.



On the Division of the Paternal Grandfather.

ABUBECR the Just (on whom be the grace of GOD) and those, who followed him, among the companions *of the Prophet*, say, “ the bre-

“ thren of the whole blood and the brethren by
 “ the father’s side inherit not with the grand-
 “ father: this is also the decision of ABU
 HANIFA (on whom be GOD’s mercy!) and
 judgments are given conformably to it. ZAID
 the son of THABIT, indeed, asserts, that they
do inherit with the grandfather, and of this opi-
 nion are both *ABU YUSUF* and *MUHAM-
 MED*, as well as *MALIC* and *ALSHAFII*.
 According to ZAID, the son of THABIT (on
 whom be GOD’s mercy!) the grandfather,
 with brothers or sisters of the whole blood and
 by the father’s side, takes the best in two cases,
 from the *mukásamah*, or *division*, and from a
 third of the whole estate. The meaning of
mukásamah is, that the grandfather is placed in
 the division as one of the brethren, and the
 brethren of the half blood enter into the divi-
 sion with those of the whole blood, to the pre-
 judice of the grandfather; but, when the grand-
 father has received his allotment, then the half
 blood are removed from the rest, *as if* disinhe-
 rited, and receive nothing; and the residue
 goes to the brethren of the whole blood; ex-
 cept when among those of the whole blood
 there is a single sister, who receives her legal
 share, I mean the whole after the grandfather’s
 allotment: then, if any thing remains, *it goes*
 to the half blood; if not, they have nothing;

and this *is the case*, when *a man leaves* a grandfather, a sister by the same father and mother, and two sisters by the same father only: *in this case* there remains to those sisters a tenth of the estate, and the correct denominator *is* twenty; but, if there be, in the preceding case, one sister by the same father only, nothing remains for her; and if one, entitled to a legal share, be mixed with them, then, after he has received his share, the grandfather has the best in three arrangements; either the division, when *a woman leaves* her husband, a grandfather, and a brother; or a third of the residue *is given*, when a man leaves a grandfather, a grandmother, and two brothers, and a sister by the same father and mother. Or a sixth of the whole estate *is given*, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the residue is better from the grandfather, and the residue has not a complete third, multiply the denominator of the third into the root of the case. If a woman leave a grandfather, her husband, a daughter, her mother, and a sister by the same father and mother, or by the same father only, then a sixth is best for the grandfather, and the *root of the case* is raised to thirteen, and the sister has nothing. Know, that ZAID, the son of THABIT (on whom be GOD's grace!) has

not placed the sister by the same father and mother, or by the same father, as entitled to a share with the grandfather, except in the case, named *acdariyyah*, and that is, the husband, the mother, a grandfather, and a sister by the same father and mother, or by the same father only; *in which case* the husband *ought to have* a moiety; the mother, a third; the grandfather, a sixth; and the sister, a moiety; then the grandfather annexes his share to that of the sister, and, a division is made between them *by the rule* "a male has the portion of two females;" *and this is*, because the division is best for the grandfather. The root is *regularly* six, but is increased to nine; and a correct distribution is made by twenty-seven. The case is called *acdariyyah*, because it occurred on *the death of* a woman belonging to the tribe of ACDAR. If, instead of the sister, there be a brother or two sisters, there is no increase, nor *is that case* an *acdariyyah*.

On Succession to Vested Interests.

IF some of the shares become vested inheritances before the distribution, as *if a woman leave* her husband, a daughter, and her mother,

and the husband die, before the estate can be distributed, leaving a wife and both his parents, *if* then the daughter die leaving two sons, a daughter, and a *maternal* grandmother, and then the grandmother die leaving her husband and two brothers, the principle in this *event* is, that the case of the first deceased be arranged, and that the allotment of each heir be *considered* as delivered according to that arrangement; that, next, the case of the second deceased be arranged, and that a comparison be made between what was in his hands, *or vested in interest*, from the first arrangement, and between the second arrangement, in three situations; and if, on account of equality, what *is* in his hands from the first arrangement quadruple with the second arrangement, then there is no need of multiplication; but, if it be not right, then see whether there be an agreement between the two, and multiply the measure of the second arrangement into the whole of the first arrangement; and, if there be a disagreement between them, then multiply the whole of the second arrangement into the whole of the first arrangement, and the product *will be* the denominator of both cases. The allotments of the heirs of the first deceased must be multiplied into the former multiplicand, I mean into the second arrangement or into its measure; and the allotments

of the heirs of the second deceased must be multiplied into the whole of what *was* in his hands, or into its measure; and, if a third or a fourth die, put the second product in the place of the first arrangement, and the third case in the place of the second, in working; *and* thus in *the case of* a fourth and a fifth, and so on to infinity.



On Distant Kindred.

A DISTANT kinsman *is* every relation, who is neither a sharer nor a residuary. The generality of the *Prophet's* companions repeat a tradition concerning the inheritance of distant kinsmen; and, according to this, our masters and their followers (may GOD be merciful to them!) have decided; but ZAID, the son of THABIT (on whom be GOD's grace!) says: "there is no inheritance for the distant kindred, but the property *undisposed of* is placed "in the publick treasury;" and with him agree MALIC and ALSHAFII, on whom be GOD's mercy! Now these distant kindred *are* of four classes: the first class is descended from the deceased; and they are the daughter's children, and the children of the son's daughters. The second sort *are* they, from whom the deceased descend; and they are the excluded grand-

fathers and the excluded grandmothers. The third sort are descended from the parents of the deceased; and they *are* the sister's children and the brother's daughters, and the sons of brothers by the same mother only. The fourth sort are descended from the two grandfathers and two grandmothers of the deceased; and they are, paternal aunts, and uncles by the same mother *only*, and maternal uncles and aunts. These, and all who are related to the deceased through them, are among the distant kindred. ABU SULAIMAN reports from MUHAMMED the son of ALHASAN, *who reported* from ABU HANIFAH (on whom be GOD's mercy!) that the second sort are the nearest of the *four* sorts, how high soever they ascend; then the first, how low soever they descend; then the third, how low soever; and lastly, the fourth, how distant soever *their degree*: but ABU YUSUF and ALHASAN the son of ZIYAD, report from ABU HANIFAH (on whom be the mercy of GOD!) that the nearest of the *four* sorts is the first, then the second, then the third, then the fourth, like the order of the residuaries; and this *is* taken *as a rule* for decision. According to both *ABU YUSUF and MUHAMMED*, the third sort has a preference over the maternal grandfather.

On the First Class.

THE best entitled of them to the succession is the nearest of them in degree to the deceased ; as the daughter's daughter, who is preferred to the daughter of the son's daughter ; and, if *the claimants* are equal in degree, then the child of an heir is preferred to the child of a distant relation ; as the daughter of a son's daughter is preferred to the son of a daughter's daughter ; but, if their degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to ABU YUSUF (may GOD be merciful to him !) and ALHASAN, son of ZIYAD, the persons of the branches are considered, and the property is distributed among them equally, whether the condition of the roots, as male or female, agree or disagree ; but MUHAMMED (on whom be GOD's mercy !) considers the persons of the branches, if the sex of the roots agree, *in which respect* he concurs with the other two ; and he considers the persons of the roots, if their sexes be different, and he gives to the branches the inheritance of the roots, in opposition to the two *lawyers*. For instance, when *a man* leaves a daughter's son, and a daughter's daughter, *then*, according to ABU YUSUF and ALHASAN, the property is distributed between them, *by the rule* " the male has the portion of

“two females,” their persons being considered; and, according to MUHAMMED, in the same manner; because the sexes of the roots agree: and, if *a man* leave the daughter of a daughter’s son, and the son of a daughter’s daughter, *then*, according to the two *first mentioned lawyers*, the property *is divided* in thirds between the branches, by considering the persons, two thirds of it *being given* to the male, and one third to the female; but, according to MUHAMMED (on whom be GOD’s mercy!) the property *is divided* between the roots, I mean *those* in the second rank, in thirds, two thirds *going* to the daughter of the daughter’s son, *namely*, the allotment of her father, and one third of it to the son of the daughter’s daughter, *namely*, the share of his mother. Thus, according to MUHAMMED (to whom GOD be merciful!) when the children of the daughters are different *in sex*, the property is divided according to the first rank *that* differs among the roots; then the males are arranged in one class, and the females in another class, after the division, and what goes to the males is collected and distributed according to the highest difference that occurs among their children, and, in the same manner, what goes to the females; and thus the operation is continued to the end according to this scheme:

S	S	S	D	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D	D
S	D	D	S	S	S	D	D	D	D	D	D	D
D	D	D	S	D	D	S	S	S	D	D	D	D
D	S	D	D	D	D	S	D	D	S	D	D	D
D	D	D	D	D	S	D	D	S	D	S	D	D

Thus MUHAMMED (to whom GOD be merciful !) takes the sex from the root at the time of the distribution, and the number from the branches ; as, *if a man* leave two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, and two daughters of a daughter's son's daughter, in this form :

The Deceased,

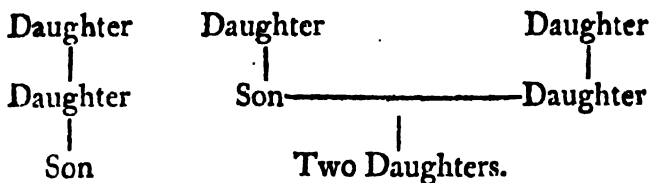
Daughter	Daughter	Daughter
Son	Daughter	Daughter
Daughter	Son	Daughter
Two Daughters	Daughter	Two Sons.

In this case according to ABU YUSUF (on whom be GOD's mercy !) the property is divided among the branches in seven parts, by considering their persons ; but, according to MUHAMMED (to whom GOD be merciful !) the property is distributed according to the highest difference of sex, I mean in the second rank, in sevenths, by the number of branches in the roots ; and, according to him, four sevenths of it go to the daughters of the daughter's son's daughter ; since that is the share of their grand-

father, and three sevenths of it, which are the allotment of the two daughters, are divided between their two children, I mean those in the third rank, in moieties; one moiety to the daughter of the daughter's daughter's son, *which* is the share of her father, and the other moiety to the two sons of the daughter's daughter's daughter, *being* the share of their mother: the correct divisor of the property is, in this case, twenty-eight. The opinion of MUHAMMED (on whom be GOD's mercy!) is the more generally received of the two traditions from ABU HANIFAH (to whom GOD be merciful!) in all decisions concerning the distant kindred; and this was the first opinion of ABU YUSUF; then he departed *from it*, and said that the roots were by no means to be considered.

A Section.

OUR learned *lawyers* (on whom be the mercy of GOD!) consider the *different* sides in succession; except that ABU YUSUF (may GOD be merciful to him!) considers the sides in the persons of the branches, and MUHAMMED (on whom be GOD's mercy!) considers the sides in the roots; as, when *a man* leaves two daughters of a daughter's daughter, who *are* also the two daughters of a daughter's son, and the son of a daughter's daughter, according to this scheme:

The Deceased.

In this case, according to ABU YUSUF, the property is *divided* among them in thirds, and then the deceased is considered as if he had left four daughters and a son ; two thirds of it, therefore, go to the two daughters, and one third to the son : but, according to MUHAMMED (to whom GOD be merciful !) the estate is *divided* among them in twenty-eight parts, to the two daughters twenty-two shares (sixteen in right of their father and six shares in right of their mother) and to the son six shares in right of his mother.

*On the Second Class.*

He among them, who is preferred in the succession, is the nearest of them to the deceased, on which side soever he stands ; and, in the case of equality in the degrees of proximity, then he, who is related to the deceased through an heir, is preferred by the opinion of ABU SUHAIL, surnamed ALFERÁIDI, of ABU FUDAIL ALKHIASSAF, and of ALI, the son of ISAI ALBASRI ; but, no preference is *given* to him

according to ABU SULAIMAN ALJURJĀNI, and ABU ALI AL BAIHATHI ALBUSTI. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the sex of those, through whom they are related, agree, and their relation be on the same side, the distribution is according to their persons, but if the sex of those, to whom they are related, be different, the property is distributed according to the first rank that differs in sex, as in the first class; and, if their relation differ, then two thirds go to those on the father's side, that *being* the share of the father, and one third goes to those on the mother's side, that *being* the share of the mother: then what has been allotted to each set is distributed among them, as if their relation were the same.

On the Third Class.

THE rule concerning them is the same with that concerning the first class; I mean, *that* he is preferred in the succession, who is nearest to the deceased: and, if they be equal in relation, then the child of a residuary is preferred to the child of a more distant kinsman; as, *if a man leave* the daughter of a brother's son, and the son of a sister's daughter, both of them by *the same*

father and mother, or by *the same* father, or one of them by *the same* father and mother, and the other by *the same* father only: in this case the whole estate goes to the daughter of the brother's son, because she is the child of a residuary; and, if it be by *the same* mother only, distribution is made between them by the rule, "A male has the share of two females," and, by the opinion of ABU YUSUF (to whom GOD be merciful!) in thirds, according to the persons, but, by that of MUHAMMED (may GOD be merciful to him!) in moieties according to the roots; and, if they be equal in proximity, and there be no child of a residuary among them, or if all of them be children of residuaries, or if some of them be children of residuaries, and some of them children of those entitled to shares, and their relation differ, then ABU YUSUF (to whom GOD be merciful!) considers the strongest in *consanguinity*; but MUHAMMED (may GOD be merciful to him!) divides the property among the brothers and sisters in moieties, considering as well the number of the branches, as the sides in the roots; and what has been allotted to each set is distributed among their branches, as in the first class: thus, if a man leave the daughter of the daughter of a sister by *the same* father and mother, she is preferred to the son of the daughter of a brother by *the same* father only, accord-

ing to ABU YUSUF (to whom GOD be merciful!) by reason of the strength of relation; but, according to MUHAMMED (may God be merciful to him!) the property is divided between them both in moieties by consideration of the roots. So, when *a man* leaves three daughters of different brothers, and three sons and three daughters of different sisters, as in *this* figure:

The Deceased.

Sister—Sister—Sister—Brother—Brother—Brother

by the same

Mother--Father--Father--Mother-Father--Father
and Mother *and Mother*


Son Son Son Daughter Daughter Daughter
 Daughter Daughter Daughter.

In this case, according to ABU YUSUF, the property is divided among the branches of the whole blood, then among the branches by the same father, then among the branches by the same mother, *according to the rule*, "the male has the allotment of two females," in fourths, by considering the persons; but, according to MUHAMMED (to whom GOD be merciful!) a third of the estate is divided equally among the branches by the same mother, in

thirds, by considering the equality of their roots in the division of the parents, and the remainder among the branches of the whole blood in moieties, by considering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other between the children of the sister, the male having the allotment of two females, by considering the persons; and *the estate* is correctly divided by nine. If *a man* leave three daughters of different brothers' sons, in this manner:

The Deceased.

Daughter ——— Daughter ——— Daughter


 of a Son of a Brother by the same

Father and Mother ——— Father ——— Mother

all the property goes to the daughter of the son of the brother by the same father and mother, by the unanimous opinion *of the learned*, since she is the child of a residuary, and hath also the strength of consanguinity.



On the Fourth Class.

THE rule as to them *is*, that, when there is only one of them, he has a right to the whole property, since there is none to obstruct him;

and, when there are several, and the sides of their relation are the same, as paternal aunts and paternal uncles by the same mother *with the father*, or maternal uncles and aunts, then the stronger of them in consanguinity is preferred, by the general assent; I mean, they, who are *related* by father and mother, are preferred to those, who are *related* by the father *only*, and they, who are *related* by the father, are preferred to those, who are *related* by the mother only, whether they be males or females; and, if there be males and females, and their relation be equal, then the male has the allotment of two females; as, *if there be* a paternal uncle and aunt both by *one* mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father, or by the same mother only: and if the sides of their consanguinity be different, then no regard is *shown* to the strength of relation; as, *if there be* a paternal aunt by the same father and mother, and a maternal aunt by the same mother, or a maternal aunt by the same father and mother, and a paternal aunt by the same mother only, then two thirds go to the kindred of the father, for they *are* the father's allotment, and one third to the kindred of the mother, for that is the mother's allotment; then what is allotted to each set is divided among them, as if the place of their consanguinity were the same.

On their Children, and the Rules concerning them.

THE rule as to them *is* like the rule concerning the first class; I mean, *that* the best entitled of them to the succession is the nearest of them to the deceased on whichever side he is *related*; and, if they be equal in relation, and the place of their consanguinity be the same, then he, who has the strength of blood, is preferred, by the general assent; and, if they be equal in degree and in blood, and the place of their consanguinity be the same, then the child of a residuary *is* preferred to whoever is not *such*; as, *if a man leave* the daughter of a paternal uncle, and the son of a paternal aunt, both of them by *the same* father and mother, or by *the same* father, all the property goes to the daughter of the paternal uncle; and, if one of them be by *the same* father and mother, and the other by the same father only, *then* all the estate goes to the claimant, who has the strength of consanguinity, according to the clearer tradition; *and this* by analogy to the maternal aunt by the same father, for though she be the child of a distant kinsman, yet she is preferred, by the strength of consanguinity, to the maternal aunt by the *same* mother *only*, though she be the child of an heir; since the weight which prevails by itself, that

is, the strength of consanguinity, is greater than the weight by another, which is the descent from an heir. Some of them (the learned) say, *that* the whole estate goes to the daughter of the paternal uncle by the same father, since she is the daughter of a residuary; and, if they be equal in degree, yet the place of their relation differ, they have no regard *shown* to the strength of consanguinity, nor to the descent from a residuary, according to the clearer tradition; by analogy to the paternal aunt by the same father and mother, for though she have two bloods, and be the child of an heir on both sides, and her mother be entitled to a legal share, *yet* she is not preferred to the maternal aunt by the *same* father; but two thirds *go* to whoever is related by the father; and their regard is shown to the strength of blood; then to the descent from a residuary; and one third *goes* to whoever is related by the mother, and there *too* regard is shown to strength of consanguinity: then, according to ABU YÜSÜF (may GOD be merciful to him!) what belongs to each set is divided among the persons of their branches, with attention to the number of sides in the branches; and, according to MUHAMMED (may GOD be merciful to him!) the property is distributed by the first line, *that* differs, with attention to the number of the branches and of the sides in

the roots, as in the first class; then this rule is applied to the sides of the paternal uncles of his parents and their maternal uncles; then to their children; then to the side of the paternal uncles of the parents of his parents, and to their maternal uncles; then to their children, as in the *case* of residuaries.

On Hermaphrodites.

To the hermaphrodite, *whose sex is quite doubtful, is allotted* the smaller of two shares, I mean the worse of two conditions, according to ABU HANÍFAH (may GOD be merciful to him!) and his friends, and this is the doctrine of the generality of the *Prophet's* companions (may GOD be gracious to them!) and conformable to it are decisions *given*; as, when *a man* leaves a son, and a daughter, and an hermaphrodite, then the hermaphrodite has the share of a daughter, since that is ascertained: and, according to ÂÁMIR ALSHÂBI (and this is the opinion of IBNU ÂBBÁS, may GOD be gracious to them both!) the hermaphrodite has a moiety of the two shares in the controversy; but *the two great lawyers* differ in putting in practice the doctrine of ALSHÂBI: *for* ABU YUSUF says, *that* the son has one share, and the daughter half a

share, and the hermaphrodite three fourths of a share, since the hermaphrodite would be entitled to a share, if he were a male, and to half a share, if he were a female, and this *is* settled by *his* taking half the sum of the two portions; or, we may say, he takes the moiety which is ascertained, together with half the moiety which is disputed, so that there come to him three fourths of a share; for he ('ABU YUSUF) pays attention to the legal share and to the increase, and he verifies *the case* by nine: or, we may say, the son has two shares, and the daughter one share, and the hermaphrodite a moiety of the two allotments, and that *is* a share and half a share. But MUHAMMED (may GOD be merciful to him!) says, that the hermaphrodite would take two fifths of the estate, if he were a male, and a fourth of the estate, if he were a female, and that he takes a moiety of the two allotments, and that *will give him* one fifth and an eighth by attention to both sexes; and the case is rectified by forty; since that is the product of one of the *numbers in the* two cases, which is four, multiplied into the other, which is five, and that product multiplied by two (*which is the number of the*) cases; and then he, who takes any thing by five, *has it* multiplied into four, and he, who takes any thing by four, *has it* multiplied into

five ; so that thirteen shares go to the hermaphrodite, and eighteen to the son, and nine to the daughter.

On Pregnancy.

THE longest time of pregnancy is two years, according to ABU HANĪFAH (may GOD be merciful to him !) and his companions ; and according to LAITH, the son of SAD ALFAHMI (may GOD be merciful to him !) three years ; and, according to ALSHĀFIĪ (may GOD be merciful to him !) four years : but according to ALZUHRI (may GOD be merciful to him !) seven years : and the shortest time for it is six months. There is reserved for the child in the womb, according to ABU HANĪFAH (may GOD be merciful to him !) the portion of four sons, or the portion of four daughters, whichever of the two is most ; and there is given to the rest of the heirs the smallest of the portions ; but, according to MUHAMMED (may GOD be merciful to him !) there is reserved the portion of three sons or of three daughters, whichever of the two is most : LAITH, son of ŠĀD, (may GOD be gracious to him !) reports this *opinion* from him ; but, by another report, *there is reserved* the portion of two sons ; and one of

the two opinions is that of ABU YUSUF (may GOD be merciful to him !) as HISHAM reports it from him ; but ALKHASS'AF reports from ABU YUSUF (may GOD be merciful to him !) that there should be reserved the share of one son or of one daughter ; and, according to this, decisions *are made* ; and security must be taken, according to his opinion. And, if the pregnancy was by the deceased, and *the widow* produce a child at the full *time* of the longest period *allowed* for pregnancy, or within it, and the woman hath not confessed her having broken her legal term *of abstinence*, *that child* shall inherit, and others may inherit from him ; but, if she produce a child after the longest *time* of gestation, he shall not inherit, nor shall others inherit from him : and if the pregnancy was from another man than the deceased, and she, *the kinswoman*, produce a child in six months or less, he shall inherit ; but, if she produce the child after the least period of gestation, he shall not inherit.

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that, by which life is proved ; as a voice, or sneezing, or weeping, or smiling, or moving a limb ; and, if the smallest *part* of the child come out, and he then die, he shall not inhe-

rit; but if the greater *part* of him come out, and then he die, he shall inherit: and, if he come out straight (*or with his head first*) then his breast is considered; I mean, if his whole breast come out, he shall inherit; but if he come out inverted (*or with his feet first*) then his navel is considered.

The chief rule in arranging cases on pregnancy is, that the case be arranged by two suppositions, I mean by supposing, that the child in the womb is a male, and by supposing, that it is a female: then, compare the arrangement of both cases; and, if the numbers agree, multiply the measure of one of the two into the whole of the other; and, if they disagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the case: then multiply the allotment of him, who would have something from the case, which supposes a male, into that of the case, which supposes a female, or into its measure; and then that of him, who takes on the supposition of a female, into the case of the male, or into its measure, as we have directed concerning the hermaphrodite; then examine the two products of that multiplication; and whether of the two is the less, that shall be given to such an heir; and the difference between them must be reserved from the allotment of that

heir ; and, when the child appears, if he be entitled to the whole of what has been reserved, it is well ; but, if he be entitled to a part, let him take that part, and let the remainder be distributed among the *other* heirs, and let there be given to each of those heirs what was reserved from his allotment : as, when a man has left a daughter and both his parents, and a wife pregnant, then the case is *rectified* by twenty-four on the supposition, that the child in the womb is a male, and by twenty-seven on the supposition, that it is a female : now between the two numbers of the arrangement there is an agreement in a third ; and when the measure of one of the two is multiplied into the whole of the other, the product amounts to two hundred and sixteen, and by that *number* is the case verified ; and, on the supposition of its male sex, the wife takes twenty-seven shares, and each of the two parents, thirty-six ; but, on the supposition of its female sex, the wife has twenty-four, and each of the parents, thirty-two ; and twenty-four are given to the wife, and three shares from her allotment are reserved ; and from the allotment of each of the parents are reserved four shares ; and thirteen shares are given to the daughter ; since the *part* reserved in her right is the allotment of four sons, according to ABU HANÍFAH (may GOD be

merciful to him !) and when the sons are four, then her allotment is one share and four ninths of a share out of four-and-twenty multiplied into nine, and that makes thirteen shares ; and this *belongs* to her, and the residue is reserved, which *amounts to* an hundred and fifteen shares. If the widow bring forth one daughter or more, then all the *part* reserved *goes to* the daughters ; and, if she bring forth one son or more, then must be given to the widow and both parents what was reserved from their shares ; and what remains must be divided among the children : and, if she bring forth a dead child, then must be given to the widow and both parents what was reserved from their shares, and to the daughter a complete moiety, that is, ninety-five shares *more*, and the remainder, which is nine shares, to the father, since he *is* the residuary.

On a Lost Person.

A LOST person is *considered as* living in regard to his estate ; so that no one can inherit from him ; and his estate is reserved, until his death can be ascertained ; or the term for a *presumption of it* has passed over : now the traditional opinions differ concerning that term ; for, by the clearer tradition, “ when, not one “ of his equals in age remains, judgement may

“be given of his death;” but HASAN, the son of ZIYAD, reports from ABU HANIFAH (may GOD be merciful to him!) that the term is an hundred and twenty years from the day on which he was born; and MUHAMMED says, an hundred and ten years; and ABU YUSUF says, an hundred and five years; and some of them, *the learned*, say, ninety years; and according to that *opinion* are decisions *made*. Some of *the learned in the law* say, that the estate of a lost person must be reserved for the final regulation of the *Imam*, and the judgement suspended as to the right of another person, so that his share from the estate of his ancestors must be kept, as in the *case* of pregnancy; and, when the term is elapsed, and judgement given of his death, then his estate *goes* to his heirs, *who are* to be found, according to the judgement on his decease; and, what was reserved on his account from the estate of his ancestor, is restored to the heir of his ancestor, from whose estate that share was reserved; since the lost person *is* dead as to the estate of another.

The principle in arranging cases concerning a lost person *is*, that the case be arranged on a supposition of his life, and then arranged on a supposition of his death; and the rest of the operation *is* what we have mentioned in the chapter of pregnancy.

On an Apostate.

WHEN an apostate *from the faith* has died naturally, or been killed, or passed into a hostile country, and the *Kádi* has given judgement on his passage *thither*, then what he had acquired, at the time of his being a believer, *goes* to his heirs, *who are* believers; and what he has gained since the time of the apostasy is placed in the publick treasury, according to ABU HANÍFAH (may GOD be merciful to him!) but, according to the two *lawyers* (ABU YÚSUF and MUHAMMED) both the acquisitions *go* to his believing heirs; and, according to AL-SHÁFIÍ (may GOD be merciful to him!) both the acquisitions are placed in the publick treasury; and what he gained after his arrival in the hostile country. *that is* confiscated by the general consent; and all the property of a female apostate *goes* to her heirs, *who are* believers, without diversity of opinion among our masters, to whom God be merciful! but an apostate shall not inherit from any one, neither from a believer nor from an apostate like himself, and so a female apostate shall not inherit from any one; except when the people of a whole district become apostates altogether, for then they inherit reciprocally.

On a Captive.

THE rule concerning a captive *is* like the rule of other believers in regard to inheritance, as long as he has not departed from the faith; but, if he has departed from the faith, then the rule concerning him *is* the rule concerning an apostate; but, if his apostasy be not known, nor his life nor his death, then the rule concerning him *is* the rule concerning a lost person.

On Persons drowned, or burned, or overwhelmed in Ruins.

WHEN a company of *persons* die, and it is not known which of them died first, they are considered, as if they had died at the same moment; and the estate of each of them *goes* to his heirs, *who are* living; and some of the deceased shall not inherit from others: this is the approved *opinion*. But ÂLÎ and IBNU MASÛÛD say, according to one of the traditions from them, *that* some of them shall inherit from others, except in what each of them has inherited from the companion of his fate.

COMMENTARY

ON

THE SIRÁʿIYYAH.

IN our administration of justice to *Mohammedans* according to their own laws, it will be of no use to inquire, what their legislator meant by declaring, that *the law of inheritances constituted one half of juridical knowledge**: if he intended any thing more than a strong assertion of its importance, he probably had in contemplation the two general modes of acquiring property, *contracts* and *succession*, or the agreement of parties and the operation of law; and this explanation of the phrase, which had occurred to me on my first perusal of it, is also suggested by *Sayyad SHARÍF*, together with a more fanciful interpretation, which *Máulavi KÁSIM* has adopted, that, *life and death* being incident to our probationary state in this world, and the

law of *succession* manifestly relating to the *dead*, it is properly opposed to all other laws, which prescribe the duties and ascertain the rights of the *living*; but we merely take notice of the sentence, that no part of the *Sirājīyyab* may be unexplained, and proceed to the *four* acts, which, on the decease of a *Mohammedan*, are to be successively performed by the magistrate, or under his authority.

I. As regard to public decency and convenience, as well as to publick religion and health, seems in all nations to require, that the bodies of deceased persons be removed out of sight, with all due speed and solemnity, at a moderate expence to be defrayed, even before the payment of their just debts, out of the property left by them, on which no legal claim, from hypothecation or otherwise, had previously attached: but the *Muselman* lawyers, who admit, that the funeral charges must in the first place be defrayed, assign a very whimsical reason for such a priority; *because*, they say, the *winding-sheet and other clothes of the dead are analogous to suitable apparel worn by the living, and consequently should not be liable to the claims of a creditor*. The legal expenses of burying a *Mohammedan* are very moderate, both in the *number* and *value* of the clothes, in which the deceased is to be wrapped: as more than *three* pieces of

cloth for a man, or than *five* pieces for a woman, would be held a prodigal superfluity, and less than those, a niggardly deficiency, of expense, so, if the funeral clothes of AMRU or HINDA were dearer than the vesture usually worn by them, when alive, it would be a culpable excess; and if cheaper, a blameable defect; but, if in fact they had been used to wear one sort of apparel on solemn festivals, another in visiting their friends, and a third, in their own houses, the value of their visiting dress must regulate that of their burial, and either extreme would be too prodigal or too parsimonious. Should their debts, indeed, cover the whole of their property, the *legal* expense of the funeral must be reduced to the *sufficient* expense, as it is called; that is, to *two* pieces of cloth for AMRU and to *three* for HINDA: the names, dimensions, and uses of all the cloths used in funerals, both for men and for women, are enumerated in *Persian* by Mánlaví KÁSÍM; but it would be useless to mention them; and it seems only necessary to add on this article, that if deceased persons leave no property whatever, or none without a special lien on it, the funeral expenses must be paid by such of their relations, as would have been compellable by law to maintain them, when living; and, if there be no such relations, by the publick trea-

fury, in which there is always an ample fund arising from forfeitures and escheats.

II. After the burial, all the just debts of the deceased must be paid out of his remaining assets, as far as they extend; and, if there be many creditors, they must be satisfied in equal proportion, except that a *debt of health*, to use the *Arabian* phrase, must be discharged before a *debt of sickness*; that is, a debt *contracted* or *acknowledged*, while the party was of sound understanding and body, is preferred, when legally proved, to one *acknowledged* in sickness, but of which no other evidence is produced. A religious vow, or promise of a charitable donation, as an atonement for sin, constitutes a debt *in conscience* only; and the sum thus promised must be paid out of a third part of the assets, after the legal creditors have been satisfied, provided that it was bequeathed by will; but, if no will was made, the temporal estate shall not be charged with a mere debt of religion.

III. The legacies of a *Muselman*, to the prejudice of his heirs, must not exceed a *third part* of the property left by him, and remaining after the discharge of his debts: over a third of such residue he has absolute power; and his legatee shall receive it immediately, whether a specifick thing or certain sum of money, or only a fractional part of his estate, was be-

queathed. This is the opinion of SHARIF; though a distinction, which the text by no means implies, has been taken between a *determinate* and an *indeterminate* legacy.

IV. We come now to the *distribution* of his estate, remaining after the payment of debts and legacies, among his *beirs* (for so we may call them, although *real* and *personal* property are undistinguished in the laws of the *Arabs*) according to certain rules derived from three sources, the *Korán*, the genuine system of oral traditions from the legislator, and those opinions in which the learned and orthodox have generally concurred*: the order, and proportions, in which the property of AMRU or HINDA must be distributed, constitute the principal subject of the work, which we have undertaken to explain.

1. The first class of *beirs* are they, who may be called *sharers*, because a certain *share* of the estate is expressly allotted to each of them in the *Korán*, and particularly in the *fourth* chapter of it.

2. Next come they, who may be distinguished by the name of *residuaries*, because they take the *residue* after the *shares* have been duly distributed; and they are of two sorts, residu-

aries by *consanguinity* and residuaries for *special cause*, the former of whom are preferred in the order of succession; the latter are the masters or mistresses of enfranchised slaves, or their *male* residuary heirs. If no *sharers* be living, the *residuaries* take the whole; but, if there be sharers by *consanguinity* and no residuaries, a farther portion of the inheritance *reverts* to them, though never to the widower or to the widow, while any heirs by blood are alive.

3. On failure of the two preceding classes, the distribution is made among those *next of kin*, who are neither *sharers* nor *residuaries*: they may be called the *distant kindred*.

4. Should none of the distant kindred be living and capable of inheriting, the estate goes (unless there be a widow or a widower, who is first entitled to a *share*) to him, who may be called the *successor by contract*; and of that succession it is necessary to give an example: if AMRU, a man of an unknown descent, say to ZAID, "Thou art my kinsman, and shalt be my successor after my death, *paying for me* any fine and ransom, to which I may become liable," and ZAID accept the condition; it is a valid contract by the *Arabian law*; and, if ZAID also be a man whose descent is unknown, and make the same proposal to AMRU, who likewise accepts it, the contract is mutual and

similar, and they are *successors by contract* reciprocally.

5. If no such agreement had been made, but if AMRU in his life time had acknowledged ZAID, a man of an unknown pedigree, to be his *brother* or his *uncle*, that is, to be related to him by his *father* or by his *grandfather*, though in truth he had no such relation, and the bare acknowledgment of AMRU cannot be admitted as a proof of it, yet, if AMRU die without retracting his declaration, ZAID is called *the acknowledged kinsman by a common ancestor*, and stands in the *fifth* class of successors, but takes the estate before the general devisee.

6. Last of all comes the person, to whom the deceased had left the whole of his property by a will duly made and proved; for, though the law secures to his heirs of the five preceding classes *two thirds* of his estate, yet it so far respects his *dominion*, while he lived, over his own property, and his *will* as to the disposal of it after his decease, that it will rather give effect to an intention not strictly conformable to law (for the *Korân* seems to allow *pious bequests* only), than suffer his estate to escheat; which must be the consequence of his dying without a representative. All such escheats to the sovereign go towards a fund for charitable uses; and according to the system of ZAID, the son of THA-

BIT, which has been shortly explained in a former publication, that fund, if it be *regularly established*, is entitled to the whole estate on failure of residuary heirs, without any *return* to the sharers, and to the entire exclusion of the *four* last classes; but this doctrine seems quite exploded.

BEFORE we proceed to the law of *shares*, it is proper to take notice of the four impediments to succession; which are slavery, homicide, difference of religion, and difference of country, or of allegiance; the last of which disabilities relates only to such as are not *Muslimans*.

1. Slavery, by the *Mohammedan* law, is either *perfect* and *absolute*, as when the slave and all, that he can possess, are wholly at the disposal of his master, or *imperfect* and *privileged*, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a female slave, who has borne a child to her master, is also *privileged*; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The *Arabian* custom of allowing a slave to cultivate a piece of land, or set up a trade, on his own account, so that he may work out his manu-

mission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their proprietors.

2. Homicide is either *with malice prepense* and punishable with *death*, or *without proof of malice*, and *expiable* by redeeming a *Muselman* slave, or by fasting two entire months, and by paying the price of blood ; or, thirdly, it is *accidental*, for which an expiation is necessary. *Malicious homicide*, or *murder* (for, by the best opinions, the *Arabian* law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous instrument likely to occasion death, as with a sharp stick or a large stone, or with fire, which has *the effect*, says KA'SIM, *of the most dangerous instrument*, and, by parity of reason, *with poison* or by *drowning* ; but those two modes of killing are not specified by him ; and there is a strange diversity of opinion concerning them : killing *without proof of malice* is, when death ensues from a beating or blow with a slight wand, a thin whip, or a small pebble, or with any thing not ordinarily dangerous : *accidental death* is, when it was neither designed nor could have been prevented

by ordinary care, as if AMRU were to shoot an arrow at a wild beast, and the arrow by accident were to kill ZAID, or if MAZIN were to fall from his terrace upon ZUHAIR and kill him by his fall; in which cases the slayer would not be permitted to inherit *from the slain*. If, however, a man were to dig a pit, or fix a large stone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary *occasion* (but not the *cause*) of the death, must pay the price of blood, but would not, it seems, be disabled from succeeding to the property of the deceased, whom he could not in strictness be said to have killed.

3. An unbeliever shall never be heir to a believer, nor conversely; but infidel subjects may inherit from infidels.

4. The difference between two states or countries consists in the difference of sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them: this difference is particularly marked between a country governed by a *Mohammedan* power and a country ruled by a prince of *any other religion*; for they are always, virtually at least, in a state of warfare, the first being called by lawyers *the seat of peace*,

and the second, *the seat of hostility*. A difference of country, therefore, which excludes from the right of inheriting, is either *actual* and *unqualified*, as when an *alien enemy* resides in the *seat of hostility*, or when an alien has chosen his domicile in the *seat of peace*, and pays the tribute exacted from infidels, in which case the *tributary* shall not be heir to the *alien enemy* dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is *qualified**, as when a *fugitive enemy* seeks quarter, and obtains a temporary residence in the *seat of peace*, or when two alien enemies are fugitives from two different hostile countries: now, although the *tributary* and the *fugitive* actually live in the same kingdom, yet, since the fugitive continues a subject of the hostile power, he remains, *as it were*, under a different government, and there is no mutual right of succession between him and the tributary; nor, by similarity of reason, between *two fugitives*, who leave two distinct hostile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their constant abode.

IF none of these four incapacities preclude the heirs of AMRU from the legal succession to his estate, which we will suppose already sold and

reduced to money of one denomination, the magistrate, or his officer, must proceed to the distribution of the *shares*; and, as they are a *moiety*, a *fourth*, an *eighth*, two *thirds*, one *third*, and a *sixth*, of the aggregate sum, it will be convenient at first to consider that sum as consisting of *twenty-four* equal parts, so that the shares will be, in whole numbers, *twelve*, *six*, *three*, *sixteen*, *eight*, and *four*.

THE *sharers* are *twelve* persons, *four* males and *eight* females; but, before we specify their respective allotments, it is necessary to premise that a *grandfather* and a *grandmother*, according to the *Arabian* idiom, signify a *male*, and a *female*, ancestor in any degree; that a *true* grandfather is he, between whom and the deceased no female ancestor intervened; that a *false* grandfather is, where the paternal line of ascent was broken by the intervention of a female; and that a grandmother also is called *true*, when no *false* grandfather intervened between her and the deceased: in short, the only *true* line of *ancestry*, according to the *Arabs*, is an uninterrupted succession of *paternal* forefathers. The *male* sharers then are the *father*, the *true* grandfather, the *brother by the same mother* only, and the *widower*: the females are the *widow*, the *daughter*, the *female issue of the son*, the *sister of the whole blood*, the *sister by the same father* only,

the *sister by the same mother* only, the *mother herself*, and the *true grandmother*.

We begin with the *males* in the order of the *shares* before enumerated; and, 1. The father of AMRŪ or HINDA takes* a *sixth* absolutely, though a *son* of the deceased be living, or any male descendant, who claims wholly through males; but, if there be no such male descendant, he becomes a *residuary heir*; and, if there be only a *daughter* of the deceased, or a *female* descendant from the son, he first has his legal share, or a *sixth*, and, when her share also has been allotted, he claims the residue. 2. The true grandfather is excluded from any share by the living father, *through whom* alone the grandfather bore a relation to the deceased; and, although a similar reason might afterwards be applied to the mother, and operate to the exclusion of her children, yet the father has the additional strength of a double title, both as a *sharer* and a *residuary*: but, if the father also be dead, *his* father, or true paternal ancestor, has exactly the same interest, except in four cases, which will be presently mentioned. 3. A single half-brother, by the same mother only, takes a *sixth*, and two or more such half-brothers, a *third*; provided that the deceased

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left neither children, nor male issue of a son, nor a father, nor a true grandfather; by any of whom the brothers by the same mother are excluded; and this article brings us necessarily to one class of *female sharers*; for, *in this instance*, there is no distinction of sex; both brothers *and sisters* by the same mother only having an equal right and an equal share in the distribution. 4. A *moiety* of HINDA's estate, if she die without children, or the issue of a deceased son, goes to her widower AMRU, who, if she leave such issue, has no more than a *fourth*.

As examples of the father's rights, let us suppose AMRU to have died worth two thousand four hundred pieces of gold, leaving his father ZAID, and either a son or a son's son, OMAR: in this case the *four hundred* pieces are the share of ZAID, and OMAR takes the remaining two thousand; but, if AMRU leave only his father ZAID and either a daughter, or son's daughter, LAILA, the father is first entitled to the *four hundred* pieces, or *sixth* part; and, after LAILA has received *twelve* hundred, or a moiety of the estate (which, as we shall see, is her *share* in this case), he takes, as *residuary*, the *eight* hundred pieces, which remains; so that the property of AMRU is equally divided between them. Should no relation be left but ZAID the father, and LEBID the brother, of the

deceased, LEBID is excluded; and the whole estate goes to ZAID. If, in the three preceding cases, the paternal grandfather SÁLIM had been left instead of ZAID, his rights would have been precisely the same; and the only difference between ZAID and SÁLIM will appear from the four following examples. 1. The paternal grandmother would be excluded by ZAID her son, but not by his father, her husband, SÁLIM. 2. If AMRU or HINDA leave a father ZAID, a mother SOLMA, and a widow ZAINEB, or widower HÁRETH, the mother takes a *third* part of what remains after ZAINEB or HÁRETH has received the legal share; but, if SÁLIM be substituted for ZAID, she would have a right to a third of the *whole assets*, according to the prevailing opinion, although ABÚ YUSÚF thought her entitled, even in that case, to no more than a third of the *remainder*. 3. The brothers of the whole blood, and those by the same father only, are excluded from the inheritance by ZAID the father, but not by the grandfather SALIM, as the best lawyers agree, dissenting on this point from their master ABÚ HANÍFAH. 4. If AMRU had manumitted his slave YÁSMIN, and died, leaving his father ZAID and a son OMAR, a *sixth* part

of the right of succession to YA'SMİN would have vested, according to AB'U YU'SUF, in ZAID, but, if the paternal grandfather SA'LIM had been left instead of the father, the whole interest would have vested in the son: in this case that illustrious lawyer ultimately dissented from his master and from his fellow-student MUHAMMED, who were both very justly of opinion, that, whether ZAID or SA'LIM were alive, on the death of the manumittor, the whole right of succession to the manumittee vested in OMAR.

Let us proceed to the shares of the *females*; and 1. If AMRU die without children, and without any issue of a deceased son, his widow HINDA must receive a *fourth* of his assets; but her share is an *eighth* only *, if any such issue be living: should he leave more widows than one, they take equal parts of such *fourth* or *eighth*; so that the legal share of the widower is always in a double ratio to that of the widow or widows: as, if HINDA die worth *twenty-four* thousand zecchins, her surviving husband AMRU must be entitled either to *twelve* or to *six* thousand; and if AMRU die with the same estate, his widow HINDA must have either *six* or *three* thousand for her sole share; or, if ZAINER and ABLA had also been legally married to AMRU, the three widows must receive

cither *two* or *one* thousand zecchins each, as the case may happen. 2. *One daughter* takes a moiety, and *two* or *more* daughters have *two thirds*, of their father's estate; but, if the deceased left a son, the rule, expressed in the *Koràn*, is this: "to one male give the portion of two females;" and the daughters in that case are not properly *sharers*, but *residuary heirs* with the son, their part of the inheritance being always in a subduple ratio to his part. Thus, if AMRU die worth *twenty-four* thousand pieces of gold, his only child FATIMA takes twelve thousand as her *share*; but, if she have three sisters, AZZA, LATIFA, and ZUBAIDA, two thirds of the assets, or *sixteen* thousand pieces, are equally divided between the four girls; and if there be a son OMAR, he must receive, in the first case, *sixteen* thousand, while FA'TIMA has *eight*; and, in the second, *eight* thousand, while she and her sisters take each *four* thousand, pieces. 3. If OMAR had died before his father, leaving female issue, and his father had then died without any daughter of his own, the daughters of OMAR would have had precisely the same shares, to which those of AMRU himself would have been entitled; but, had FA'TIMA been living, she would have taken *half* the estate, or *twelve* thousand pieces of gold, and a *sixth* only, or *four* thousand, the complement of *two thirds* or *sixteen* thousand, would have

been equally distributed among her nieces. Had FA'TIMA and AZZA been at that time alive, they would have taken their legal share, to the exclusion of their brother's *female* issue, unless the right of that issue had been sustained by a *male* in an *equal*, or a *lower* degree, who would have made them *residuaries*, "the *male* " taking, by the rule, the portion of females;" but a male in a *higher* degree would not have given them that advantage; and, if OMAR himself had survived, his daughters would have been wholly excluded. The *six* cases, therefore, or different situations, of the female issue of OMAR may be thus recapitulated: 1. A single female takes a *moiety*. 2. Two or more have *two thirds*. 3. A *male* in the same, or a lower, degree than themselves, gives them a *residuary* right in a subduple ratio to his own. 4. With a daughter of AMRU, who is entitled to *half*, they would have only a *sixth*, to make up the regular share of the female issue. 5. They are excluded, if AMRU left more daughters than one, but no male issue in any equal, or a *lower*, degree. 6. A son also of AMRU wholly excludes them. In the three first cases, their legal claims correspond with those of daughters: but in the three last their rights are weaker, because they are in a remoter degree from the deceased.

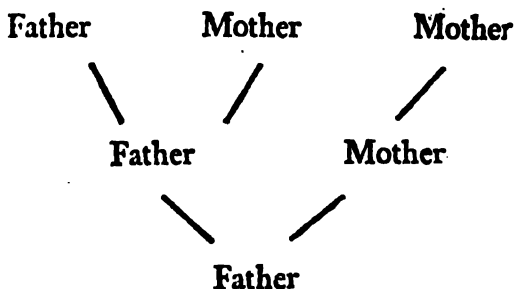
The pedigree exhibited in the text* is called by the *Arabs* the *tashbib*, because, in their opinion, it sharpens the understanding, and captivates the fancy as much as the *composition of an elegant love-poem*, which the word literally signifies; but, without adopting so wild a metaphor, we may truly say, that it is very perspicuous, and that no comment, after what has been premised, could render it clearer. An example, however, will show more distinctly than an abstract rule, in what manner an estate is divisible, when a *male* descendant gives a *residuary* title to a *female* in the same, or in a *higher*, degree. Call the only surviving male descendant OMAR, and suppose him to be the brother of AMINA, who stands lowest in the first set of females: here the highest female in that set must receive a *moiety* of the assets; the next below her takes a *sixth* together with the highest of the second set, as the complement of *two thirds*; and the *residue* must be divided into *five* portions, of which OMAR claims *two* and each of the females in the same degree, one; but the three females below them are excluded. If OMAR be the brother of ZARI'FA, whom we suppose the lowest of the middle set, the remaining *third* of the estate must be distributed in *sevenths*,

because there are *five* females, *three* in a higher, and *two* in an equal, degree with OMAR, who must always have a double portion; and, if he be the brother of UNAIZA, the lowest female of the *third* set (who, on the former supposition, would have been excluded), there will be *six* female *residuaries* entitled to portions with OMAR, but in a subduple ratio; so that, if AMRU died worth *twenty-four* thousand ducats, the daughter of his son takes *twelve* thousand of them; the two daughters of his sons' sons receive each *two* thousand; and, the residue being *eight*, OMAR is entitled also to *two* thousand ducats, while UNAIZA and the *five* women, who remain, have each *one* thousand, which they owe to the fortunate existence of OMAR. 4. * The rights of sisters by the same father and mother, and (5.) those of sisters by the same father only, are explained in the text with sufficient clearness, but it is proper to observe, that the *fifth* case of the first class is comprised in the *seventh* case of the second; and that (6.) the sisters by the same mother have been mentioned in a former section. There will be no use in repeating the ingenious arguments of IBNU ABBAS in support of his dissent on many points from other old lawyers, nor the

solid answers, which have been given to his objections; but a story, told by SHARIF, may here be repeated, because it conveys an idea of the traditionary *Arabian* law, and shows from what sources our excellent author derived his doctrine: ‘HUDHAIL used to relate, that ABU ‘MUSA, being consulted on the distribution of ‘an heritage among a *daughter*, a son’s *daughter*, and a *sister*, answered, *the first must have ‘a moiety; the second a sixth; and the third, ‘what remains*; but “Consult IBNU MAS‘UD, “added he, and apprise me of his answer:” ‘when IBNU MAS‘UD, was consulted, he said, ‘that he was present, when MUHAMMED himself gave the same decision;’ and, when that answer was reported to ABU MUSA, he said, “you must put no questions to me, as long as “that illustrious lawyer remains with you.”

7. * Although the different rights of the mother in different cases be very clearly explained, yet her title to *a third of the residue* may be illustrated by two examples: first, if ADHRA leave only her husband WAMIK, her mother SÔADA, and her father MÂZIN, half of her estate goes to WAMIK, a third of the other half, or a sixth of the whole, to SÔADA and the remainder to

MAZIN; but, secondly, if WAMIK leave only his wife ADHRA, his mother ZAINEB and his father LEBID, the widow takes a quarter of his property, while ZAINEB has a third, and LEBID two thirds, of the remaining three quarters. 8. In giving an example of the division between two great grandmothers *, we may anticipate in some degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by SHARIF is in this form :



Now the paternal grandmother's mother, and the mother of the paternal grandfather, are together entitled to a sixth, and the paternal grandfather's father to the residue, of the estate, which ought, by the general rule, to be divided into *six* parts, because *six* is the denominator of the share; but, to avoid a fraction, we must

observe the proportion of *one*, or the sixth part, to *two*, or the number of persons entitled to it; and, since *one* and *two* are *prime* to each other, we must multiply *two* into *six*, and the product is the number of parts into which the property must be divided; so that of *twelve* cows or horses the great grandfather will have *ten*, and each of the great grandmothers, *one*.

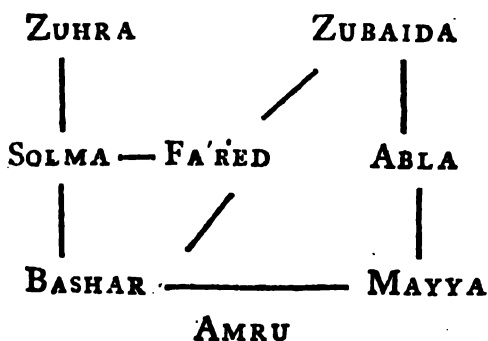
The great grandfathers are called ancestors in the *second*, and their fathers, ancestors in the *third*, degree, and so forth; and it must be remarked that in these tables the number of *female* ancestors, who inherit with the *males*, is equal to the number of such degrees: thus in the following;

F	M	M	M
F	M	M	
	F	M	
		F	

there are *three* great great grandmothers, and the estate must be divided into *eighteen* parts, because one and three are prime to each other. We suppose in both pedigrees, that the highest line only are left by the deceased AMRU; for, by the text, *the nearest female ancestor excludes the more distant*; and, if he leave his father ZUHAIR, and his paternal grandmother AZZA, with LAILA his maternal grandmother's mother,

ZUHAIR takes the whole inheritance ; for he excludes AZZA, and she, being nearer in degree, excludes LAILA.

Let us conclude the subject with a case put by SHARIF in illustration of the pedigree in the text : ZUBAIDA gave her daughter's daughter MAYYA in marriage to her son's son BASHAR, and the young pair had a son AMRU, who acquired an estate, and died : now ZUBAIDA was both paternal and maternal great grandmother of AMRU, and had, therefore, a *double* relation to him ; but another woman, named ZUHRA, had married her daughter SOLMA to FARED, who was the son of ZUBAIDA, brother of ABLA, and father of BASHAR ; so that ZUHRA was AMRU's paternal grandmother's mother, and had only a single relation ; as it will appear by the following arrangement of the family :



The case of a *triple* relation will be no less evident from the following pedigree :

ZUBAIDA would be entitled in the first case to *two-thirds*, and in the second, to *three-fourths*, of that *sixth* part, according to the number of modes, in which she was related to AMRU or ZAID.

No comment could add perspicuity to the chapter on *residuary heirs* *, until we come to the cases of inheritance from enfranchised slaves †, where a short elucidation of the text appears necessary. If AMRU enfranchise NERGIS, and die, leaving a son BECR, and a daughter LAILA; then, on the death of NERGIS without *residuary* heirs by blood, his property goes wholly to BECR, and LAILA, by the traditional rule, takes nothing; but, suppose LAILA herself to manumit her black slave, SUSEN, who then purchases a slave MISC, and gives him freedom; and suppose SUSEN first, and MISC afterwards, to die without residuary heirs, in this case the estate of MISC goes to LAILA; nor would there be any difference, if the two manumissions had been conditioned to pay a certain sum of money at a certain time. The case of a manumission promised on the death of the mistress, has rather more difficulty; but an example will make it clear: LAILA promises NERGIS, that, on her death, he shall

be free ; but, by the persuasion of a *Christian* friend, she renounces her faith, and seeks refuge in a hostile country : now *a believer cannot be the slave of an infidel* ; and the *Mohammedan* judge pronounces accordingly, that NERGİS has gained his freedom ; but LAILA, repenting of her apostasy, returns to her native country and her former belief ; after which NERGİS dies without heirs : LAILA succeeds as residuary to her promisee, as she would have succeeded to a slave of NERGİS purchased after the decision of the judge, if a similar promise of manumission at his death had been made by the master ; and if that second promisee had died without heirs after her repentance and return. Should CÂFÜR, a slave of LAILA, marry, with her consent, MERJANA, the freedwoman of AMRU, the son of that couple would be born free, because, in respect of freedom or slavery, *a child has the condition of its mother*, and he bears a relation to AMRU her manumitter ; but should LAILA give CÂFÜR his freedom, he would *draw* that relation from AMRU, through himself, to LAILA, so that she would succeed to the son of CÂFÜR and MERJANA, if he died after his parents and without other heirs of the first or second class : the case would be similar, if CÂFÜR being enfranchised, had

bought a slave MISC, and given him in marriage to the freedwoman of ZAID; for, if the issue of that marriage had been a son, born free, but with a relation to ZAID, and if CAFUR had then given MISC his liberty, he would have *drawn* from ZAID the relation of his freedman's child, and transferred it, through himself, to LAILA his former mistress. This doctrine of a *relation* (as the *Arabs* call it) first *vested* through the mother and then *devested* through the father, is founded on a decision of OTHMAN in the case of ZUBAIR and RAFI.

We had occasion before, to mention the difference (according to ABU YUSUF) between the *father*, and the *grandfather*, of the manumittor in regard to their succession, with his *son*, to the property of a freedman; nor can any thing of moment be added here; but it will be proper to explain at large the concluding case in the chapter of *residuaries*, which proves, that the relation of enfranchisement may arise by the *act of law* as well as by the *act of the party*. Let it be premised, that marriage is prohibited between kindred of two classes; first, between all those in ascending or descending lines of consanguinity, who are called *near*; secondly, between brothers and sisters, and their issue, or between nephews or nieces and aunts or uncles, paternal

or maternal, who are called *intermediate*; but, between those of the third, or *distant*, class, as the first or other cousins, there is no prohibition: now, if AMRU or HINDA purchase a kinswoman or kinsman within either of the *prohibited* degrees, the slave becomes instantly free, and a right of succession vests in the purchaser, though the mastership began and ended in one moment. Call the three daughters of HARETH a slave, ZUBAIDA, SAFIYA, AMINA, who derived freedom from their mother, and two of whom, the first and third, purchase HARETH for fifty pieces of gold: he becomes in that instant free; and, if he die leaving property, two thirds of it go to his three daughters as their legal shares, and the residue belongs to the two, who procured him liberty; three fifths of it to ZUBAIDA, who contributed her *thirty*, and two fifths to AMINA, who added her *twenty*, pieces. To arrange the distribution without fractions, begin with *three*, the denominator of the legal share: now *two*, its numerator, is *prime* to the number of sharers; and *one* is prime also to *five*, the number of residuary portions; but *thirty* and *twenty* are *composed* to one another, since *ten* measures thirty by *three* and twenty by *two*; and *five*, the sum of those tenths, may be considered as standing in the place of the

number of residuaries : again, *five* and *three* are prime to each other, and their product is *fifteen*, which, being multiplied into *three*, the first-mentioned denominator, produces *forty-five*, the number of equal parcels, into which HARETH's estate must be divided ; so that *thirty*, or *two thirds*, may be distributed in *tens* to the three daughters, and *fifteen* or the residue, in *threes* to the *two*, who redeemed their father ; ZUBAIDA taking in all *nineteen*, AMINA *sixteen*, and SAFIYA, only *ten*, portions of the inheritance. This is the calculation of SHARIF, and the grounds of it will presently appear ; but the operation might have been shortened thus : multiply the denominator of the *legal share* into the number of sharers, and then multiply the product into the denominator of the *residuary portions*.

The chapter of *exclusion** is very perspicuous ; but the case of an *unbelieving* heir having really occurred in the time of ALI, we may insert it as a monument of early *Arabian* jurisprudence. SOLMA had embraced the new faith, and died, leaving her husband, and two brothers by the same mother, who were all three believers, with a *son*, who continued an infidel : on a dispute concerning the inheritance, ALI and ZAID

gave a moiety to the widower, considering the son as actually *dead*, a third to the half-brothers, and the rest to such of the residuaries as believed in the *Korán*; while IBNU'L MASUÚD insisted, that the son was *dead* as to the right of inheriting, but alive as to the power of excluding, and thought that he drove the widower from *a moiety* to a *fourth part* only of SOLMA's estate; but the former opinion has prevailed, and in a curious book (for which there must have been abundant materials) entitled *The Dissensions of the Learned*, it is admitted, that, by universal assent, if AMRU leave a father, who is either a slave or an infidel, and a paternal grandfather, who is both free and a believer, the father is considered as *dead in law* to all purposes, and the grandfather is heir to AMRU.

We come now to the *Arabian* method of ascertaining the smallest number of *parcels*, into which an estate can be divided, so as to avoid fractions in the legal distribution of it: that *number* we call the *denominator*, or divisor, of the *estate*, though the *Arabick* word mean literally *the place of coming out*; and the problem is easily solved by the following rules: if the two numbers in question be prime, multiply one of them into the other; if they be *composit* to each other, multiply the *measure* of one into the second, and the product will be the number

fought. The whole section * is as clear as it could be made in a verbal translation; and it would be superfluous to add examples of all the cases, which must occur to every one, who has attentively perused the preceding parts of the work.

A case, which arose in the reign of OMAR, has given occasion to some debate †: LAILA died, leaving only AMRU her husband, HINDA her mother, and ABLA her sister of the whole blood. Now the husband and sister were each entitled to a moiety, and the mother, to a third, of LAILA's property, which, by the rule then established, could be divided into *six* parts only; but ABBAS, a companion of MUHAMMED, being consulted by the Caliph, proposed, that the regular divisor should be so *increased*, that of *eight* parts AMRU and ABLA might each take *three*, and HINDA *two*. The son of ABBAS, whose opinions were always rather ingenious than solid, was present at the decision; but, fearing the bad temper of the Caliph, suppressed at that time his own sentiments: he thought, that the *sister*, having (as we have seen) a weaker right, should bear the loss, because, *where different rights concur, the weakest invariably yields*; and he said, that if an arithmetician

* Page 226.

† Page 227.

could number the sands, yet he could never make *two halves* and a *third* equal to a whole; but his opinion has never been adopted, because, although the *sister* may in some cases be removed into a distinct class of heirs, yet, with a husband and a mother of the deceased, her share is fixed by positive law, and she cannot by any means be deprived of it; so that the shares of all the claimants must be diminished in *exact proportion*; for instance, if the property had been *twenty-four* pieces of gold, the mother would claim *eight*, and each of the other heirs, *twelve*; now those claims cannot all be satisfied, but eight is to twelve, as *six* to *nine*, which will be the respective shares, according to the decision of ABBAS.

Examples of the divisor *six* increased to *seven* and to *nine*, or of *twelve* to *thirteen*, *fifteen*, and *seventeen*, would appear equally ingenious, but would swell this commentary to an immoderate size: there are two decisions, however, deserving particular notice, because they were made in real causes, and have been universally approved. ZUBAIDA left her husband ADNAN, with *two sisters of the whole blood*, *two sisters by the same mother only*, and the *mother* herself; whose legal shares, in order as they are mentioned, were a *moiety*, *two thirds*, *a third*, and *a sixth*: it was impossible, therefore, to distribute them out of

thirty pieces, for instance, divided into *six* equal parcels; but the judge, named SHURAIH, divided the whole estate into *ten* parcels, each consisting of *three* pieces. and allotted them to the claimants in the proportion of their shares; that is, to the husband, *three* parcels, to the sisters of the whole blood, *four*; to the half-sisters, *two*; and to the mother, *one*; assuring ADNAN, who at first complained of the judgement, that OMAR had made a similar decision; and this case acquired celebrity among the *Arabs* by the name of SHURAIHIYYA. The next case, which was answered at once by ALI, while he was haranguing the people in the *mimbar*, or pulpit, at CÚFA, is fully stated in the text: the share of the widow was, regularly, an *eighth*; that of the daughters, *two thirds*; and that of each parent, a *sixth*, all which cannot be distributed out of *twenty-four* parcels; but ALI pronounced, that the property of the deceased should be divided into *twenty-seven* equal parts, of which the widow should have *three*; the daughters *sixteen*; and the two parents, *eight*. It is recorded, that, when the person, who consulted ALI, was much dissatisfied with his answer, and asked *whether the widow was not legally entitled to an eighth*, the Caliph said rapidly, "it is become a *ninth*," and proceeded in his harangue with his usual eloquence.

The arithmetical part of the *Sirājiyya* * is very simple, and may be found in the first pages of all our elementary books ; but the difference of the *Arabian* idiom occasions a little obscurity. The chapter on primes and measures is founded on a simple analysis : when two numbers are compared, they are either equal or unequal ; if unequal, either the smaller is an aliquot part of the greater, or they have a common measure, which must either be *unit* alone, or some *number*, which the *Arabs* define a *multitude composed of units*. When the greatest common measure is found by the rule, they consider the two numbers as *agreeing* in a fraction, which has that common measure for its denominator and unit for its numerator ; but the nature of the *Arabick* language makes it impossible to express in a single word the fractions less than a *tenth* : thus *twenty-seven* and *twenty-four* agree, as they express it, in a third ; and a *third* of each number is called its *wafk*, or measure, as *nine* of twenty-seven, and *eight* of twenty-four. After this explanation of the word, which is translated *the measure*, there will be no difficulty in the following cases.

I. † AMRU leaves only his father and mother and ten daughters : now, by the rule, his estate

* Page 228.

† Page 230.

should be divided into *six* parts, because the share of each parent is a *sixth*, and that of all the daughters *two thirds*; but *four* parts cannot be distributed, without a fraction, among *ten* persons; for which reason we must multiply *five*, which is the measure of *ten*, into *six*, which is the first number of parcels, and the product *thirty* is the number of lots, into which the property of AMRU must in fact be divided; each of his parents taking *five* lots, and each of his daughters *two*.

II. HINDA leaves her husband, both her parents, and six daughters; whose legal shares are a *fourth*, *two sixths*, and *two thirds*, of the inheritance: now the regular denominator of the lots would be *twelve*, but it is raised to *fifteen*; and since *eight* parcels cannot be distributed equally among *six* daughters, the *measure* of *six*, or *three*, is multiplied by *fifteen*; so that of *forty-five* lots *nine* may go to the husband, *twelve* to the parents, and *twenty-four* to the daughters, in exact proportion to their first distributive shares.

It will be very easy to apply the remaining rules to all the other examples given by SIRA'J'UDDIN*; but since, in the two last cases, which are not likely to occur, the inheritance

must be divided into 4320 and 5040 parcels, the calculation, after the *Arabian* mode, in words at length, would be insufferably tedious, and the reader may make it in figures with little or no trouble. The latter of those two cases* is, however, subjoined; because it will fully explain the section, in which no examples are given. SĀAD leaves *two* wives, *six* female ancestors, capable of inheriting together, *ten* daughters, and *seven* paternal uncles, whose shares of *twenty-four* (the *root*, as they call it, of this case) are *three*, *four*, *sixteen*, and *one*; for the uncles can only take what the others leave. Now by observing the primes and measures, and working according to the rule, we come to 210, which must be multiplied by *twenty-four*, and the product gives the smallest number of parcels, into which SĀAD's estate can be duly divided: the products of that multiplicand (210) by 3, 4, 16, give 630, 840, 3360, which are the allotments of the *wives*, *female ancestors*, and *daughters*; and the allotment of each sharer appears at once from the following proportions:

<i>Persons.</i>		<i>First Shares.</i>		<i>MULTIPLICAND.</i>		<i>SHARES OF EACH.</i>
2	:	3	::	210	:	531.
6	:	4	::	210	:	140.
10	:	16	::	210	:	336.

The last act of the *Muselman* judge is to make an actual division of the state *; and we will suppose that LAILA, in the case answered by by ABBAS, had left ZAINEB and ABLA, two sisters of the whole blood, with AMRU, her husband, and HINDA, her mother; and that her property amounted only to *twenty-five* gold *mohrs*: now the *root* of the case is increased, as we have seen, from *six* to *eight*, which is prime to twenty-five; and the products of *two*, the share of each sister, of *three*, the share of the husband, and of *one*, the share of the mother, multiplied by the number of gold *mohrs*, are 50, 75, and 25, which, divided by *eight*, give the following shares: to each sister, 6 *mohrs*, 4 *rupees*; to AMRU, 9 *m.* 6 *r.*; to HINDA, 3 *m.* 2 *r.* Had LAILA's estate been *fifty* gold *mohrs*, the distribution would have been thus:

	M.	R.
ZAINEB, . . .	12,	8.
ABLA,	12,	8.
AMRU,	18,	12.
HINDA,	6,	4.

It seems needless to give examples of the simple rules for ascertaining the dividends of each *class*; but the passage concerning creditors,

at the close of the chapter, is made obscure by extreme brevity, and requires a short illustration. Suppose the assets of AMRU to be *nine* pieces of gold; his debts, *five* pieces to S^AAD, and *ten* to AHMED; here the aggregate of the debts, *fifteen*, is composit to *nine*, and their *measures* are *five*, and *three*; so that, by the rule before-mentioned of distribution among *heirs*, AHMED will receive *six*, and S^AAD, *three* pieces; but, had the debtor left *thirteen*, which would have been prime to the amount of both debts, then *fifteen*, standing in the place of the *verification*, as they call it, must be the divisor of the several products, arising from the multiplication of *ten* and *five* into thirteen, and the quotients $8\frac{2}{3}$ and $4\frac{1}{3}$ will be the respective dividends of AHMED and S^AAD.

The practice of *subtraction** arose from the case of ABDUR'RAHMAN and his four wives, decided in the reign of OTHMAN; and the section concerning it will be made clear by a fuller explanation of the example in the text. We have seen, that the widower is entitled to a *moiety*, the mother to a *third*, and the uncle, to the *residue*; so that, if LAILA's estate be divided into *six* parcels, the distribution may be made without a fraction: but if the widower agree to

keep the *mahr*, or nuptial present to his wife, which he had never actually paid, instead of his *three sixths* of the whole, the remainder, after deducting the *mahr*, must be divided into *three* parts, of which the mother will have *two*, and the uncle *one*. So, if the mother agree to take a jewel, or other specifick thing, in lieu of her *two sixths*; or the uncle, a slave or a carriage, in the place of his *sixth* part, the remainder, which would be *four* parts in the first case, and *five* in the second, must go to the other claimants in proportion to their shares. Again; if AMRU leave his mother FATIMA, two sisters by the same mother, LATIFA and SOLMA, and the son of a paternal uncle, SELIM; here also the inheritance must be divided, by the rule, into *six* parts: now, if the deceased left a female slave and thirty gold *mohrs*, and, if SOLMA consented to keep the slave instead of her legal share, or a *sixth*, the remainder of the property must then be divided into *five* parcels, six gold *mohrs* in each, of which FATIMA and LATIFA must receive each *one* parcel, and SELIM, the *three* parcels, which remain. It is obvious, that, if the first calculation were made, in the preceding cases, on a supposition, that the taker of the specifick thing was dead or incapable of inheriting, there would be either a *defect* or an *ex-*

cess in some of the allotments to the other claimants.

There is no difficulty in the chapter on the *return**, except what arises from the *Arabick* idiom, to which the reader is probably by this time habituated; but it is necessary to remark, that, although, by the letter of the *Korán* and the strict rules of law, no *return* can be made to the *widower* or *widow*, yet an equitable practice has prevailed, in modern times, of *returning* to them *on failure of sharers by blood and of distant kindred*. The last case in the chapter can rarely occur; and the result of the calculation (which fills ten pages in the *Persian* work of *Maulavi KASIM*) is, that, of 1440 parcels, the *four* widows take $(36 \times 5 =)$ 180; the *nine* daughters $(36 \times 28 =)$ 1008; and the *six* female ancestors $(36 \times 7 =)$ 252; so that 45 parts go to each *widow*, 112 to each *daughter*, and 42 to each *female ancestor*.

The rights of the *paternal grandfather* have been more disputed than any other point of *Arabian* law; no fewer than *seventy* contradictory decisions having been made concerning them in the reign of OMAR; but the dispute is now settled among the *Sunnis* according to the opinion of ABU HANIFA; and the chapter on

division seems to have been inserted merely from respect to ABU YUSUF and MUHAMMED, who dissented on this point from their master *: it is one of the clearest chapters in the *Sir'ajiyah*, and will be useful to us, if the question should arise in a family of *Shi'ahs*, who follow; no doubt, the opinions of ALI and ZAID. The case called *acdariyya*, which was decided by the son of THABIT, and has acquired such celebrity in *Irak*, that it is distinguished among the lawyers of that country by the epithet of *algharrà*, or the *luminous*, is a perspicuous example of the grandfather's division in a *double* ratio with the sister: the conjecture, formerly hazarded by myself, that it was named *acdariyya*, because the rules of inheritance are *disturbed* by it in favour of the grandfather, had occurred, I see, to some *Arabs*, and is mentioned by SHARIF without disapprobation.

It will be necessary to illustrate by examples the chapter on *succession to vested hereditary interests* †: and, first, we may suppose, that ZAID had two wives, named ZAINEB and LATIFA, and that ZAINEB died possessed of separate property, leaving her husband, her mother ZUHRA, and HINDA, her daughter by her former husband: now the legal shares, in order as the

* Page 237—240

† Page 240—242.

sharers are named, would be a *fourth*, a *sixth*, and a *moicty*; so that regularly the estate should be divided into *twelve* parts, but it is here divided into *four*, because there must be a *return* to ZUHRA and HINDA, in the proportion of their shares, that is as *one* to *three*; but, when ZAID has taken his *fourth*, the *three* fourths, which remain, cannot be distributed in that proportion; and, since *three* and *four* are prime to each other, we therefore multiply *four*, considered as the number of persons entitled to a return, into *four*, the denominator of the husband's *share*, and the square number answers the purpose of integral distribution; for of *sixteen* parcels ZAID will be entitled to *four*, ZUHRA to *three*, and HINDA to *nine*.

Suppose next, that ZAID himself dies, before any distribution actually made, leaving only LATIFA before-mentioned, his mother BASIRA, and his father ABID: here *four* parts of the former inheritance having vested in him, the distribution is easy; *one* part going to LATIFA, as her *fourth*, one also to BASIRA, as her *third of the residue*, and *two* parts to ABID; in exact proportion to their several claims on his own estate.

Thirdly, suppose HINDA to die before any actual distribution, leaving the before-named

ZUHRA, her grandmother, ZUBAIDA her daughter, and two sons, HA'TIF and BASHAR: now she had a *vested interest* in *nine* parts out of the *sixteen*, and, her own estate being divisible into *six* parts, we observe, that *nine* and *six* are composited to each other, or agree, as the *Arabian* phrase is, *in a third*; so that a third of *six*, or *two*, must be multiplied into *sixteen*, and the product *thirty-two* will be the denominator for both cases; for of *thirty-two* parts *nine* will vest in ZUHRA (*six* as mother to ZAINEB, and *three* as grandmother to HINDA), *twelve* in the two sons, *three* in ZUBAIDA, and *eight* in ZAID's representatives; since, to ascertain the share of each individual, the just-mentioned shares out of *sixteen* must be multiplied by *two*, and those out of *six*, by *three*, which is here called the *measure* of HINDA's vested interest.

Let us fourthly suppose, that ZUHRA also dies before any distribution, leaving her husband CAAB, and two brothers CALIB and TARIF. Now her own estate is arranged by *four*, the husband taking a *moiety*, and each of the residuaries *one fourth*; but *four* and *nine* are prime to each other; and *four*, therefore, multiplied by *thirty-two*, produces an *hundred and twenty-eight*, the denominator of both cases: we must then multiply by *four* the shares out of *thirty-two*, and by *nine* the shares out of *four*,

and the products will be lots of the several claimants ; *eight* parcels going to LATIFA, *sixteen* to ABID, *eight* to BASIRA, *forty-eight* in moieties to HÂTIF and BASHAR, *twelve* to ZUBAIDA, *eighteen* to CÂAB, and *eighteen* in moieties to CALIB and TÂRIF.

We need only add, that, although the conclusion of the chapter before us be obscured by its extreme conciseness, yet it plainly means, that, "when any number of heirs die successively before the distribution, if the *shares* "vested in the last deceased do not quadrature "with the *arrangement* of his own estate, we "must consider all those, who died before him, "as *one deceased heir*, and himself as the *second*, "and then work by the preceding rules;" to give more examples would be very easy, but the reader would find them insupportably tedious.

All controversies on the claims of the *next of kin*, who are neither *sharers* nor *residuaries*, are now at an end *; for it seems to be settled, that they succeed according to the order prescribed in our text.

I. On the *first* class of distant kindred the doctrine of ABU YUSUF has far more simplicity

than that of MUHAMMED, in which there is an appearance of intricacy ; but an attentive reader will find no difficulty in the case reduced to the form of a table, in which the lowest of the six ranks are supposed to be the claimants of AMRU's estate * : he will see, that ABU YUSUF would divide that estate into *fifteen* parts, giving *one* to each of the female, and *two*, by the rule in the *Koràn*, to each of the male, descendants ; but that MUHAMMED would arrange it in *sixty* parcels, *twenty-four* of which would go to the representatives of the *three* sons, and *thirty-six* to those of the *nine* daughters ; due regard being paid to the *double portion* of the male descendants, so as to bring the shares of the *twelve* claimants to the following order from the left hand, *twelve, eight, four ; nine, three, six ; six, two, four ; three, two, one*. The correctness of this method has, it seems, obtained it a preference over that of ABU YUSUF, whose practice, however, is followed, on account of its facility, in *Bokhàra* and some other places ; although of the two different traditions from ABU HANIFA, that reported by MUHAMMED be the more publicly known and the more generally believed.

The reader would be unnecessarily fatigued,

* Page 244, 245.

if we were to exhibit every step of the arithmetical process, by which the estate of AMRU must be distributed, according to the opinion of MUHAMMED, between his *great grandson* by females only, and his *two great granddaughters*, who have the advantage of a male in the line of descent *; nor does the section concerning the difference of *sides* require elucidation.

II. On the *second* class, or the *grandfathers* and *grandmothers*, who are excluded from *shares*, we need only sum up the doctrine of our author in the words of SHARIF:—"The degrees
 " in this case are either equal or unequal; if
 " *unequal*, the nearer is preferred; if *equal*, the
 " preference is given to the person claiming
 " *through a sharer*; if there be an *equality* in
 " that respect, the *sides* must be the same or dif-
 " ferent; if different, the distribution must be
 " made in *thirds*, the paternal side having a
 " *double* allotment; if *the same*, the *sexes* of the
 " *roots*, or ancestors, must agree, or not; if
 " they agree, the estate must be distributed ac-
 " cording to the persons of the *branches*, or
 " claimants; if not, according to the *first* rank
 " that differs, as in the preceding class †."

III. There seems no difficulty in the chapter ‡ on the third class of distant kindred; but

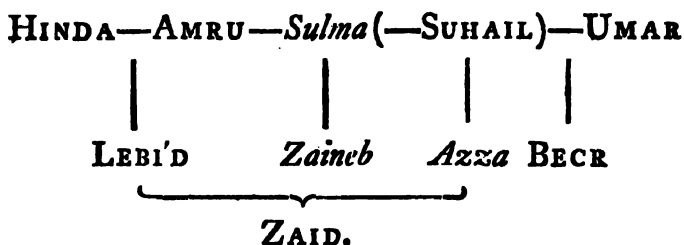
* Page 247, 248.

† Page 249.

‡ Page 250.

it must be remarked, that although the brothers and sisters by the same *mother only* take equally, according to the *Koràn*, without any distinction of sex, yet that exception to the general rule by no means extends to the *issue* of such brothers and sisters.

IV. Although the claims of *uncles* and *aunts*, in three cases, be clearly explained in the text *, yet it may not be improper to subjoin an example from the commentary of *Maulavi KÁ-SIM*, which the following pedigree will make more intelligible than his dry state of the case :

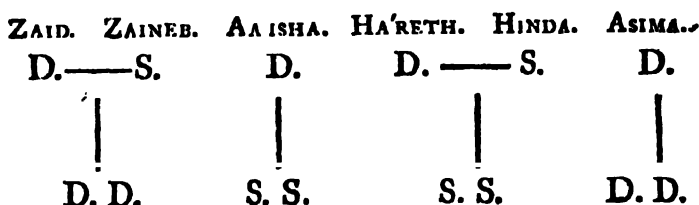


AMRU, having had by HINDA a son, named LEBID, married SULMA, by whom he had a daughter, named ZAINEB: after AMRU's death, SULMA married SUHAIL, to whom she produced AZZA, and after his death, she married UMAR, by whom she became the mother of BECR: now ZAID was the son of LEBID and AZZA; and he died, leaving no heirs but

BEER the brother, by the *same mother*, of his mother AZZA, and ZAINEB, who was his *paternal* aunt by the *same father* AMRU, and his *maternal* aunt by the *same mother* SULMA. In this case, the property of ZAID must be divided into *nine* parcels, of which the *paternal* aunt will have *two thirds*; and the remaining *third* will go to the *maternal uncle and aunt* in the ratio of *two to one*; so that ZAINEB, in her two characters, will be entitled to *seven ninths*.

There seems no necessity to expatiate on the *children of uncles and aunts*, or on the *cousins*, as we should call them, in different degrees*; because the text will be sufficiently perspicuous to those, who perfectly understand the preceding sections: but, since a curious case is put by SHARIF, I am unwilling to suppress it; especially as it will throw light on the whole subject before us. The *father* of AMRU had a brother, ZAID, and two sisters, ZAINEB and AAISHA, by the same father only: his *mother* also had a brother, HARETH, and two sisters by the same father, named HINDA and ASIMA: first, his father and mother died; then, all his *uncles and aunts*, leaving the following issue: ZAID left two daughter's daughters, who were also the daughters of ZAINEB's sons; AISHA, two sons

of her daughter; HARETH, two daughter's sons, who were also the sons of the son of HINDA; and ASIMA, two daughter's daughters; as in this pedigree:



AMRU himself afterwards died, with no heirs but the *grandchildren* of his uncles and aunts: In this case ABU YUSUF would have divided the inheritance into *thirty* parts; *twenty* for the *paternal* side; that is, *five* for each of the sons, and as many for each of the daughters, who have a double relation; and *ten* for the *maternal* side, or *four* for each of the sons, who are doubly related, and *one* for each of the daughters: but MOHAMMED, having divided AMRU's estate into *thirty-six* allotments, would have given *twenty-four* to the paternal, and *twelve* to the maternal side; that is, *six* to each of ZAID's granddaughters, as such, and *four* to each of them, as granddaughters of ZAINEB; *two* to each of AAISHA's grandsons; *three* to each grandson of HARETH, as such; and *two* more to each of them, as grandsons of HINDA;

while *one thirty-sixth* part would have gone to each of ASIMA's female descendants. The reason of these different distributions will appear from what has preceded; but the arithmetical processes would fill many pages, and would be thought, I am persuaded, unnecessarily prolix.

On the chapter concerning hermaphrodites*, I shall make no particular observation; since monstrous births are, I trust, extremely rare in all countries, and the subject is too shocking to be discussed without actual necessity; nor will it answer, I imagine, any useful purpose to relate the old *Arabian* stories, and strange opinions of some lawyers, concerning the longest possible time of gestation†; which is now limited, on the authority of AAISHA, one of MOHAMMED's wives, to *two years*; and, though the *Muselmans* have traditionary accounts of *three, four, or even five* children produced at one birth, yet the practice, we find, is to reserve the share of *one* son; or that of one *daughter*, if, on supposition of her birth, the sum reserved would be larger‡. The practice of *reservation* for the unborn child is well explained by the case in the text, to which we may now proceed, since the rest of the chapter needs no illustration; unless it be necessary to inform

* Page 256.

† Page 258.

‡ Page 259, 260.

the reader, that a widow ought by law to abstain for a certain time after her husband's death, from the caresses of any other man ; and, if she freely confess that she has not abstained, it cannot be certain, that her husband was the father of a child born more than six months after his death. Let us then suppose AMRU to die, leaving a daughter ZAINEB, his mother ASUMA, his father LEBID, and his wife HINDA enseint*. So that, if a male child be born, AMRU's estate ought regularly to be divided into *twenty-four* parts, but, on the birth of a female, into *twenty-seven* ; because, in the first case, the *shares* are an *eighth*, for the widow, and a *sixth* for each of the parents ; but, in the second, besides the shares just mentioned, the daughters would have *two-thirds* between them, and it would be the case of *Mimberiyya*†. Now *three* is the common measure of *twenty-four* and *twenty-seven*, and the several measures of those numbers are *eight* and *nine*, either of which, multiplied into the other whole number, gives *two hundred and sixteen* for the product ; and that, according to what has preceded, is the number of shares into which the inheritance must be actually divided. In the first case HINDA would have *twenty-seven* shares ; LEBID

and ASUMA, each *thirty-six*; the posthumous son *seventy-eight*, and ZAINEB, his sister, *thirty-nine*; but, in the second, the widow would have *twenty-four*; and each of the parents, *thirty-two*; while the posthumous daughter and her sister would divide the remainder between them, each taking *sixty-four* shares. Should *four* posthumous sons be born, *ninety-nine* shares would go to the widow and both parents; while the remainder would be divided among the children by the rule before mentioned, ZAINEB receiving *thirteen* parts, and each of her brothers *twenty-six*; but, in the case of a miscarriage, the daughter would be entitled to *a hundred and eight* parts, or a moiety of the whole estate, and the *nine* parts remaining would go to LEBID as residuary heir.

The time, at which an absent person is presumed in law to be dead, has varied, we see, in different ages*; but the modern practice I understand to be this: if ZAID has been so long absent, that no man can tell whether he be dead or alive, and if *seventy* years have elapsed from the day of his birth, he is presumed to be dead, as to *his own* property, from the end of that term, but, as to his hereditary claims on the property of *another*, from the day of his absence;

* Page 262.

so that, in the first case, no person, dying within the seventy years, could have inherited any part of *his* estate; nor, in the second, could he inherit from any one, who died after the day, when he first was missed. Though the arrangement of an inheritance, on which an absent person may have a claim, be sufficiently clear from what has just preceded, yet a feigned case in illustration of it will not, perhaps, be thought wholly superfluous. If HINDA then die at *Murshbedabad*, leaving AMRU her husband, with two sisters of the whole blood, NA'DIRA and SACI'NA, all residing in that city, and a whole brother ZAID, who has long been absent and unheard of, we must consider what effect his life or his death would have on the inheritance: if he be dead, AMRU must have a *moiety* of the estate, and the sisters *two thirds* between them; and, if he be living, the widower will still have a right to his half, but ZAID will take twice as much as either of the sisters. Now, on the first supposition, the assets of HINDA must be divided, as we have shown, into *seven* shares, of which AMRU must have *three*, and each of the sisters, *two*; but, on the second, into *eight* parts, *four* of which go to the husband, and *two* to the brother, while NADIRA and SACI'NA can only have *one* a piece; so that the widower has an interest in supposing ZAID alive, and the sisters, in supposing him dead: *fifty-six*, therefore, or the

product of *seven* and *eight*, which are *prime* to one another, is the number of shares, into which the estate must be divided; *twenty-four* of them being delivered to AMRU, and seven to each of the females, as the least shares to which they can in either event be severally entitled; if ZAID then return to the city, *four* shares more go to AMRU, and *fourteen* are the right of the brother; but, if his death be proved, or presumed by lapse of time, the *eighteen* reserved shares must be divided equally between SACINA and NADIRA, to complete their *two sevenths*, which the law gives, in that case, to each of them. The *Persian* commentator has added three cases in one of which the two first divisors of the assets are *composit* to each other; but the operation in all of them is too easy to require an example.

In the sections concerning apostates and prisoners of war*, there seems to be no obscurity; but it is proper to add, that, as the law is now settled, the heirs of an apostate, who were in being at the time of his death, are entitled to their legal shares, whether they were born before or after his apostasy; though a husband or wife cannot succeed to an apostate, because a change of religion is an immediate dissolution of the marriage.

We are now come to the concluding section, which cannot be better illustrated than by two feigned cases from the *Persian* and *Arabian* comments. 1. ZAID and his daughter ABLA were at sea in the same ship, together with BASHAR, his brother's son, and his great nephew AMRU, son of BASHAR: the ship was lost, and all, who were in it, perished; so that which of them first died, could never be clearly ascertained. Now AMRU left behind him a wife and a daughter; and ABLA had an only son: in this case, by the opinion of ABU HANIFAH and his followers, the four drowned persons are supposed to have perished in the same instant, and their several estates go to their surviving heirs respectively, according to the rules, which have been already explained; but by one of two traditions from ALI, the assets of ZAID being equally divided, and ABLA being supposed to have outlived her father, the son takes one moiety in her right, while the other moiety is conceived at first to have vested in BASHAR, and then in AMRU, between whose widow and daughter it is distributable according to law. 2. KA'SIM and his younger half-brother HASAN were drowned in the same boat, each leaving a mother, a daughter, and a patron, by whom each of them had been manumitted: then, if each of them left *ninety* pieces of gold on shore, the pro-

perty of each must be severally distributed, according to the HANIFEANS; the daughter of each taking *half*, or *forty-five* pieces; the mother a *sixth*, or *fifteen*, and the manumittor, as residuary, the *thirty* pieces which remain; but according to ALI, the younger brother HASAN being first considered as the survivor, that residue vests in him, and is then distributed, in the just mentioned ratio; *half* of it, or *fifteen*, going to his daughter; a *sixth*, or *five* pieces, to his mother; and *ten*, the residue, to his patron; next, KA'SIM being supposed to have survived, the same rule is applied to him; so that the daughter of each takes on the whole *sixty*; the mother, *twenty*; and the manumittor, *ten* pieces of gold.

قَدْ طُبِعَ هَذَا الْكِتَابُ الْمَسْمُومُ بِالْفَرَنْسِ السَّرَاجِيَّةِ

بِدَارِ الْإِمَارَةِ بِلَدَةِ كَلْكَتَةِ الْمُحَمِّيَّةِ وَذَلِكَ بِأَمْرِ

سِرْوَلِيمَ يُونُسَ الَّذِي هُوَ أَحَدُ حُكَّامِ السُّلْطَانِيَّةِ الْعَالِيَةِ

السُّلْطَانِيَّةِ

فِي سَنَةِ الْفِ وَخَمْسِينَ وَوَاحِدٍ مِنَ الْهَجْرَةِ النَّبَوِيَّةِ

N.B. The *Arabic* sheets must be placed according to the signatures (from the right hand to the left) so as to begin where an *English* book would end, and to end where that would begin. To follow page 322, vol. vi.

تَصْحِيحُ الْكِتَابِ

عَدَدُ الْأَوْرَاقِ . ١ . التَّصْحِيحُ السَّقِيمُ

١٩ الْإِنَاثُ الْإِنَاثُ

١٧ ابْنِي بِنْتِ بِنْتِ بِنْتِ . ابْنِي بِنْتِ بِنْتِ بِنْتِ بِنْتِ

١٧ بِنْتِ ابْنِ بِنْتِ بِنْتِ . بِنْتِ ابْنِ بِنْتِ بِنْتِ

١٧ بِنْتِي بِنْتِ ابْنِ بِنْتِ . بِنْتِي بِنْتِ ابْنِ بِنْتِ

١٧ الْآخِرُ الْآخِرُ

١٧ الرَّوَايَتَيْنِ الرَّوَايَتَيْنِ

١٧ بِنْتِ بِنْتِ

١٧ بِنْتِي بِنْتِي

١٧ ابْنِ ابْنِ

١٧ ابْنِ --- بِنْتِ --- بِنْتِ ابْنِ بِنْتِ بِنْتِ

تَصْحِيحُ الْكِتَابِ

عدد الأوراق	التَّصْحِيحُ	السَّقِيمُ
١٥	أُولَئِهِمْ	أُولَئِهِمْ
١٥	فَأَنَّهَا	فَأَنَّهَا
١٦	أَوْكَانَ	أَوْكَانَ
١٦	صِفَّةً	صِفَّةً
١٦	أَثَلَاثًا	أَثَلَاثًا
١٦	لِلذَّكَرِ	لِلذَّكَرِ
١٦	رَحْبَةُ اللَّهِ	رَحْبَةُ اللَّهِ
١٦	أَثَلَاثًا	أَثَلَاثًا
١٦	وَالْإِنَاثُ	وَالْإِنَاثُ

تَضْحِيحُ الْكِتَابِ

عدد الأوراق	التضحيح	السقيم
٦	أَعْتَقَنَّ	أَعْتَقَنَّ
١٢	مَالِكُ	مَالِكُ
١٢	إِنْ وَانَفَّ	أَنْ وَانَفَّ
١٣	ثُمَّ أَضْرَبُ	ثُمَّ أَضْرَبُ
١٣	أَخْتِ	أَخْتِ
١٥	أَبَوِي	أَبَوِي
١٥	الرَّابِعُ	الرَّابِعُ
١٥	أَنْ أَقْرَبَ	إِنْ أَقْرَبَ
١٥	الْهَآخُوذُ	الْهَآخُوذُ

مَا تَوَامَعَا فَبَالَ كُلٌّ وَاحِدٍ مِنْهُمْ لَوْرَثَتَهُ الْأَحْيَاءُ وَلَا يَرِثُ

بَعْضُ الْأَمْوَاتِ مِنْ بَعْضٍ هَذَا هُوَ الْمَخْتَارُ وَقَالَ عَلِيٌّ

وَأَبْنُ مَسْعُودٍ فِي أَحَدِي الرَّوَايَتَيْنِ عَنْهَا بَعْضُهُمْ

يَرِثُ مِنْ بَعْضٍ إِلَّا فِيمَا وَرِثَ كُلٌّ وَاحِدٍ مِنْهُمْ مِنْ صَاحِبِهِ

تَمَّتِ الْفَرَائِضُ السِّرَّاجِيَّةُ بِعَوْنِ

اللَّهِ تَعَالَى

فَهُوَ فِيهِ بِالْإِجْمَاعِ وَكَسَبَ الْهَرْتَدَةُ جَمِيعًا لَوَرَّثَهَا الْمُسْلِمِينَ
 بِالْخِلَافِ بَيْنَ أَصْحَابِنَا رَحِمَهُمُ اللَّهُ وَأَمَّا الْهَرْتَدُ فَلَا يَرِثُ
 مِنْ أَحَدٍ لَمْ يَنْتَسِبْ وَلَمْ يَمُتْ مِثْلَهُ وَكَذَلِكَ الْهَرْتَدَةُ
 لَا تَرِثُ مِنْ أَحَدٍ إِلَّا إِذَا ارْتَدَّ أَهْلُ نَاحِيَةٍ بِأَجْمَعِهِمْ فَحِينَئِذٍ
 يَتَوَارَثُونَ

بَابُ الْأَسِيرِ

حُكْمُ الْأَسِيرِ كَحُكْمِ سَائِرِ الْمُسْلِمِينَ فِي الْهِيرَاثِ مَا لَمْ
 يَفَارِقْ دِينَهُ فَإِنْ فَارَقَ دِينَهُ فَحُكْمُهُ حُكْمُ الْهَرْتَدِ فَإِنْ لَمْ يَعْلَمْ
 رِدَّتُهُ وَلَا حَيَاتُهُ وَلَا مَوْتَهُ فَحُكْمُهُ حُكْمُ الْمَقْتُولِ

فَصَلِّ فِي الْغُرْتِي وَالْحَرْتِي وَالْهَدْمِي

إِذَا مَاتَ جَمَاعَةٌ وَلَا يُدْرِي أَيُّهُمْ مَاتَ أَوَّلًا جُعِلُوا كَأَنَّهُمْ

مِنْ مَالِهِ لِأَنَّ الْمَفْقُودَ مَيِّتٌ فِي مَالٍ غَيْرِهِ الْأَصْلُ فِي تَصْحِيحِ

مَسَائِلِ الْمَفْقُودِ أَنْ تَصَحَّحَ الْمَسْئَلَةَ عَلَى تَقْدِيرِ حَيَاتِهِ ثُمَّ

تَصَحَّحَ الْمَسْئَلَةَ عَلَى تَقْدِيرِ وَفَاتِهِ وَبَاقِي الْعَمَلِ

مَا ذَكَرْنَا فِي الْحَبْلِ

فَصْلٌ فِي الْهَرْتَدِ

إِذَا مَاتَ الْهَرْتَدُ أَوْ قُتِلَ أَوْ كُفَّ بِدَارِ الْحَرْبِ وَحَكَمَ الْقَاضِي

بِلَحْوِقِهِ فِي مَا اكْتَسَبَهُ فِي حَالِ إِسْلَامِهِ فَهُوَ لَوَرَّثَتِهِ الْمُسْلِمِينَ

وَمَا اكْتَسَبَهُ فِي حَالِ الرِّدَّةِ يُوضَعُ فِي بَيْتِ الْهَالِ عِنْدَ

أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَعِنْدَهَا الْكُسْبَانُ جَمِيعًا لَوَرَّثَتِهِ

الْمُسْلِمِينَ وَعِنْدَ الشَّافِعِيِّ رَحِمَهُ اللَّهُ الْكُسْبَانُ يُوضَعَانِ

فِي بَيْتِ الْهَالِ وَمَا اكْتَسَبَهُ بَعْدَ اللَّحْوَقِ بِدَارِ الْحَرْبِ

يُصَحِّحُ مَوْتَهُ أَوْ يَهْضِي عَلَيْهِ الْهَدَّةُ وَاخْتَلَفَتِ الرِّوَايَاتُ فِي تِلْكَ
الْهَدَّةِ فَغَيْبُ ظَاهِرِ الرِّوَايَةِ أَنَّهُ إِذَا لَمْ يُبَيَّنَّ أَحَدٌ مِنْ أَقْرَانِهِ
حُكْمَ بَهْوَتِهِ فَيُرَوَّى الْحَسَنُ بْنُ زِيَادٍ عَنِ ابْنِ حَنِيفَةَ رَحِمَهُ اللَّهُ
أَنَّ تِلْكَ الْهَدَّةَ مِائَةٌ وَعِشْرُونَ سَنَةً مِنْ يَوْمٍ وَلِدَ فِيهِ وَقَالَ
مُحَمَّدُ مِائَةٌ وَعِشْرِينَ سَنِينَ وَقَالَ أَبُو يُونُسَ مِائَةٌ وَخَمْسَ سِنِينَ
وَقَالَ بَعْضُهُمْ تِسْعُونَ سَنَةً وَعَلَيْهِ الْقُتُوبِيُّ وَقَالَ بَعْضُهُمْ
مَالُ الْهَقُودِ مَوْقُوفٌ إِلَى اجْتِهَادِ الْإِمَامِ وَمَوْقُوفٌ الْحُكْمُ
فِي حَقِّ غَيْرِهِ حَتَّى يُوقَفَ نَصِيبُهُ مِنْ مَالِ مَوْرَثِهِ كَمَا فِي
الْحَبْلِ فَإِذَا مَضَتْ الْهَدَّةُ وَحُكِمَ بِبَهْوَتِهِ فَهَالَهُ لَوْرَثَتِهِ
الْهُجُودِينَ عِنْدَ الْحُكْمِ بِبَهْوَتِهِ وَمَا كَانَ مَوْقُوفًا لِأَجَلِهِ مِنْ
مَالِ مَوْرَثِهِ يَرُدُّ إِلَى وَارِثِ مَوْرَثِهِ الَّذِي وَقَفَ ذَلِكَ الْهُجُودُ

سَهْمًا لِأَنَّ الْهَوْتُوفَ فِي حَقِّهَا نَصِيبٌ أَرْبَعَةَ بَنِينَ عِنْدَ
الْبَحْنِيفَةِ رَحِمَهُ اللَّهُ وَإِذَا كَانَ الْبَنُونَ أَرْبَعَةً فَنَصِيبُهَا سَهْمٌ
وَأَرْبَعَةُ أَتَسَاعِ سَهْمٍ مِنْ أَرْبَعَةٍ وَعِشْرِينَ مَضْرُوبًا فِي تِسْعَةِ فِصَارٍ
ثَلَاثَةَ عَشَرَ سَهْمًا فِيهَا وَالْبَاقِي مَوْقُوفٌ وَهُوَ مِائَةٌ وَخَمْسَةٌ
عَشَرَ سَهْمًا فَإِنْ وَلَدَتْ بِنْتًا وَاحِدَةً أَوْ أَكْثَرَ فَجَمِيعُ الْهَوْتُوفِ
لِلْبَنَاتِ وَإِنْ وَلَدَتْ ابْنًا وَاحِدًا أَوْ أَكْثَرَ فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ
مَا كَانَ مَوْقُوفًا مِنْ نَصِيبِهِمْ وَمَا بَقِيَ يُقَسَّمُ بَيْنَ الْأَوْلَادِ
وَإِنْ وَلَدَتْ مِثْنًا فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ مَا كَانَ مَوْقُوفًا مِنْ
نَصِيبِهِمْ وَلِلْبَنَاتِ إِلَى تَهَامِ النِّصْفِ فَهُوَ خَمْسَةٌ وَتِسْعُونَ سَهْمًا
وَالْبَاقِي لِلْأَبِ وَهُوَ تِسْعَةُ أَهْمٍ لِأَنَّهُ عَصَبَةٌ

بَابُ الْهَقُودِ

الْهَقُودُ حَيٌّ فِي مَالٍ مَحْتَمِيٍّ لَا يَرِثُ مِنْهُ أَحَدٌ وَيُوقَفُ مَالُ الْمَحْتَمِيِّ

وَاحِدٍ مِنَ الْوَرَّةِ مَا كَانَ مَوْقُوفًا مِنْ نَصِيْبِهِ كَمَا إِذَا تَرَكَ بِنْتًا

وَأَبَوَيْنِ وَامْرَأَةً حَامِلَةً فَالْهَسْبَةُ مِنْ أَرْبَعَةٍ وَعَشْرِينَ عَلَيَّ

تَقْدِيرُ أَنْ الْحَمْلَ ذَكَرَ وَمِنْ سَبْعَةٍ وَعَشْرِينَ عَلَيَّ تَقْدِيرُ أَنَّهُ

أَنْثَى وَبَيْنَ عَدَدِي تَصْحِيحُ الْهَسْبَتَيْنِ تَوَافَقَ بِالثَّلَاثِ

فَإِذَا ضَرَبَ وَفَقَ أَحَدَهُمَا فِي جَمِيعِ الْآخِرِ صَارَ الْحَاصِلُ مَاتَيْنِ

وَسِتَّةَ عَشْرٍ سَهْمًا وَمَتَّهَا تَصَحَّ الْهَسْبَةُ وَعَلَيَّ تَقْدِيرُ ذَكَورَتِهِ

لِلْمَرْأَةِ سَبْعَةٌ وَعَشْرُونَ وَلِكُلِّ وَاحِدٍ مِنَ الْأَبَوَيْنِ سِتَّةٌ

وِثْلَاثُونَ وَعَلَيَّ تَقْدِيرُ الْإِنْثَى لِلْمَرْأَةِ أَرْبَعَةٌ وَعَشْرُونَ وَلِكُلِّ

وَاحِدٍ مِنَ الْأَبَوَيْنِ اثْنَانِ وَثَلَاثُونَ فَيُعْطَى لِلْمَرْأَةِ أَرْبَعَةٌ

وَعَشْرُونَ وَيُوقَفُ مِنْ نَصِيْبِهَا ثَلَاثَةُ أَشْهُمٍ وَيُوقَفُ مِنْ نَصِيْبِ

كُلِّ وَاحِدٍ مِنَ الْأَبَوَيْنِ أَرْبَعَةُ أَشْهُمٍ وَيُعْطَى لِلْبِنْتِ ثَلَاثَةَ عَشْرٍ

الحمل ذكر وعلي تقدير انه انثى ثم تنظر بين تصحيح

المسئلتين فان توافقا فاضرب وفق احديهما في جميع

الآخري وان تباینّا فاضرب كل احديهما في جميع الآخري

فالحاصل تصحيح المسئلة ثم اضرب نصيب من كان له شئ

من مسئلة كورته في مسئلة انوثته اوفي وفقها ثم من كان

له شئ من مسئلة انوثته في مسئلة كورته اوفي وفقها

كها ذكر نافي الخنثي ثم انظر في الحاصلين من الضرب

ايهما اقل يعطى لذلك الوارث والفضل بينهما موقوف من

نصيب ذلك الوارث فاذا ظهر الحمل فان كان مستحقا

لجميع الموقوف فيها وان كان مستحقا للبعض فيأخذ

ذلك البعض والباقي مقسوم بين الورثة فيعطى لكل

وَلَمْ تَكُنِ الْهَرَاةُ اقْرَتْ بِانْقِضَاءِ الْعِدَّةِ يَرِثُ وَيُورِثُ عَنْهُ وَإِنْ
جَاءَتْ بِالْوَلَدِ لَأَكْثَرُ مِنْ أَكْثَرِ مَدَّةِ الْحَمَلِ لَا يَرِثُ وَلَا يُورِثُ
عَنْهُ وَإِنْ كَانَ الْحَمَلُ مِنْ غَيْرِهِ جَاءَتْ بِالْوَلَدِ لِسِتَّةِ أَشْهُرٍ أَوْ
أَقَلَّ يَرِثُ وَإِنْ جَاءَتْ بِالْوَلَدِ لَأَكْثَرُ مِنْ أَقَلِّ مَدَّةِ الْحَمَلِ
لَا يَرِثُ وَطَرِيقُ مَعْرِفَةِ حَيَاةِ الْحَمَلِ وَقْتُ الْوِلَادَةِ إِنْ يَوْجَدُ
مِنْهُ مَا يَعْلَمُ بِهِ الْحَيَاةُ كَصَوْتٍ أَوْ عَطَاسٍ أَوْ بَكَاءٍ أَوْ ضَحْكٍ أَوْ
تَحْرِيكِ عَضُوفٍ إِنْ خَرَجَ أَقَلُّ الْوَلَدِ ثُمَّ مَاتَ لَا يَرِثُ وَإِنْ خَرَجَ
أَكْثَرُهُ ثُمَّ مَاتَ يَرِثُ إِنْ خَرَجَ الْوَلَدُ مُسْتَقِيمًا فَالْمُعْتَبَرُ
صَدْرُهُ أَعْنِي إِذَا خَرَجَ صَدْرُهُ كُلُّهُ يَرِثُ وَإِنْ خَرَجَ مَتَكُوسًا
فَالْمُعْتَبَرُ سَرْتُهُ الْأَصْلُ فِي تَصْحِيحِ مَسَائِلِ الْحَمَلِ إِنْ
تَصَحَّحَ الْهَسْنَةُ عَلَيَّ تَقْدِيرِينَ أَعْنِي عَلَيَّ تَقْدِيرَ إِنْ

سِنِينَ وَعِنْدَ الشَّافِعِيِّ رَحِمَهُ اللَّهُ أَرْبَعُ سِنِينَ وَعِنْدَ الزَّهْرِيِّ

رَحِمَهُ اللَّهُ سَبْعَ سِنِينَ وَأَقْلَهَا سِتَّةَ أَشْهُرٍ وَيُوقِفُ لِلْحَبْلِ

عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ نَصِيبُ أَرْبَعَةِ بَنِينَ أَوْ نَصِيبُ أَرْبَعِ

بَنَاتٍ إِيَّهَا أَكْثَرُ وَيُعْطَى لِبَقِيَّةِ الْوَرِثَةِ أَقْلُ الْأَنْصِبَاءِ وَعِنْدَ

مُحَمَّدٍ رَحِمَهُ اللَّهُ يُوقِفُ نَصِيبَ ثَلَاثَةِ بَنِينَ أَوْ ثَلَاثِ بَنَاتٍ

إِيَّهَا أَكْثَرُ رَوَاهُ عَنْهُ لَيْثُ بْنُ سَعْدٍ رَضِيَ اللَّهُ عَنْهُ وَفِي رِوَايَةٍ

أُخْرَى نَصِيبُ ابْنَيْنِ وَاحِدٍ الرَّوَايَتَيْنِ عَنْ أَبِي يُوسُفَ

رَحِمَهُ اللَّهُ رَوَاهُ عَنْهُ هِشَامٌ وَرَوَى الْخَصَافُ عَنْ أَبِي يُوسُفَ

رَحِمَهُ اللَّهُ أَنَّهُ يُوقِفُ نَصِيبُ ابْنٍ وَاحِدٍ أَوْ بَنَاتٍ وَاحِدَةٍ وَعَلَيْهِ

الْقَتَوِيُّ وَيُؤْخَذُ الْكَفِيلُ عَلَى قَوْلِ الْوَرِثَةِ كَانَ الْحَبْلُ مِنْ

الْهَيْتِ وَجَاءَ بِالْوَلَدِ لِتَهَامٍ أَكْثَرُ مَدَّةِ الْحَبْلِ أَوْ أَقْلُ مِنْهَا

مُحَمَّدٌ رَحِمَهُ اللَّهُ يَأْخُذُ الْخَنْثِيَّ خَمْسِي الْهَالِ إِنْ كَانَ ذَكَرًا
 وَرُبْعَ الْهَالِ إِنْ كَانَ أُنْثَى فَيَأْخُذُ نِصْفَ النَّصِيِّينَ وَذَلِكَ
 خَمْسٌ وَثَنٌ بِاعْتِبَارِ الْحَالَيْنِ وَتَصَحُّحُ مِنْ أَرْبَعِينَ وَهُوَ
 الْجَمْعُ مِنْ ضَرْبِ أَحَدِ الْهَسَلَتَيْنِ وَهِيَ الْأَرْبَعَةُ
 فِي الْآخِرَى وَهِيَ الْخَمْسَةُ ثُمَّ الْهَبْلُغُ فِي الْحَالَتَيْنِ فَمِنْ
 كَانَ لِمَشْيِيٍّ مِنَ الْخَمْسَةِ فَضْرُوبٌ فِي الْأَرْبَعَةِ وَمَنْ كَانَ لَهُ
 شَيْءٌ مِنَ الْأَرْبَعَةِ فَضْرُوبٌ فِي الْخَمْسَةِ فَصَارَ لِلْخَنْثِيِّ
 ثَلَاثَةُ عَشَرَ وَلِلْأَبْنِ ثِنَايَةَ عَشَرَ وَلِلْبَنَاتِ تِسْعَةٌ أَهْمُ
 بَابُ فِي الْحَمْلِ

أَكْثَرُ مَدَّةِ الْحَمْلِ سِتَانِ عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ
 وَأَصْحَابِهِ وَعِنْدَ لَيْثِ بْنِ سَعْدٍ الْقَهْمِيِّ رَحِمَهُ اللَّهُ ثَلَاثُ

رَضِيَ اللَّهُ عَنْهُمْ وَعَلَيْهِ الْقَتُولُ كَمَا إِذَا تَرَكَ ابْنًا وَبِنْتًا وَخَنَثِي

فَلِلْخَنَثِي نَصِيبٌ بِنْتٌ لِأَنَّهُ مُتَيْقِنٌ وَعِنْدَ عَامِرِ الشَّعْبِيِّ

وَهُوَ قَوْلُ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهَا لِلْخَنَثِي نِصْفٌ

النَّصِيبِينَ بِأَلْهِنَا زَعَمُوا اخْتَلَفَانِي تُخْرِجُ قَوْلَ الشَّعْبِيِّ قَالَ

أَبُو يُونُسَ لِلْبَيْنِ سَهْمٌ وَلِلْبِنْتِ نِصْفٌ سَهْمٌ وَلِلْخَنَثِي ثَلَاثَةٌ

أَرْبَاعٌ سَهْمٌ لِأَنَّ الْخَنَثِي يَسْتَحِقُّ سَهْمًا إِنْ كَانَ ذَكَرًا

نِصْفًا إِنْ كَانَ أُنْثَى وَهَذَا مُتَيْقِنٌ فِي اخْتِذِ نِصْفِ مَجْمُوعِ

النَّصِيبِينَ أَوْ نَقُولُ يَأْخُذُ النِّصْفَ الْهَتِيقَنُ مَعَ نِصْفِ

النِّصْفِ الْهَتِنَازِ فِيهِ فَصَارَ لَهُ ثَلَاثَةُ أَرْبَاعٍ سَهْمٌ لِأَنَّهُ يَعْتَبَرُ

السَّهْمَ وَالْعَوْلَ وَتَصَحَّحَ مِنْ تِسْعَةٍ أَوْ نَقُولُ لِلْبَيْنِ سَهْمَانِ وَلِلْبِنْتِ

سَهْمٌ وَلِلْخَنَثِي نِصْفُ النَّصِيبِينَ وَهُوَ سَهْمٌ وَنِصْفُ سَهْمٍ وَقَالَ

لَابِ لَكِنَّ الثَّلَاثِينَ لِمَنْ يَدْلِي بِقَرَابَةِ الْأَبِ فَيُعْتَبَرُ فِيهِمْ قُوَّةُ
 الْقَرَابَةِ ثُمَّ وَلَدَ الْعَصَبُ الثَّلَاثَ لِمَنْ يَدْلِي بِقَرَابَةِ الْأُمِّ وَيُعْتَبَرُ
 فِيهِمْ قُوَّةُ الْقَرَابَةِ ثُمَّ عِنْدَ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ مَا أَصَابَ
 كُلَّ فَرِيقٍ يُقَسَّمُ عَلَى أَبْدَانِ فُرُوعِهِمْ مَعَ اعْتِبَارِ عَدَدِ
 الْجِهَاتِ فِي الْفُرُوعِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ يَقَسَّمُ الْهَالِ
 عَلَى أَوَّلِ بَطْنٍ اخْتَلَفَ مَعَ اعْتِبَارِ عَدَدِ الْفُرُوعِ وَالْجِهَاتِ
 فِي الْأَصُولِ كَمَا فِي الصِّنْفِ الْأَوَّلِ ثُمَّ يَنْتَقِلُ هَذَا الْحُكْمُ إِلَى
 جِهَةِ عُمُومَةِ أَبَوَيْهِمْ وَخَوَلَتَيْهِ ثُمَّ إِلَى أَوْلَادِهِمْ ثُمَّ إِلَى جِهَةِ عُمُومَةِ
 أَبَوَيْ أَبَوَيْهِمْ وَخَوَلَتَيْهِ ثُمَّ إِلَى أَوْلَادِهِمْ كَمَا فِي الْعَصَبَاتِ

بَابُ الْخَنْثَى

لِلْخَنْثَى الْهَشِكِلِ أَقْلُ النَّصِيبِينَ اعْنِي أَسْوَأَ الْحَالَتَيْنِ
 عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَأَصْحَابِهِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ

الْعَمَّ وَابْنِ الْعَمَّةِ كِلَاهُمَا لِأَبٍ وَأُمٍّ أَوَّلِ ابْنِ الْهَالِ كُكُلُهُ لِبَنَتِ
الْعَمِّ وَإِنْ كَانَ أَحَدُهُمَا لِأَبٍ وَأُمٍّ وَالْآخَرُ لِأَبٍ كَانَ الْهَالُ كُكُلَهُ
لَبْنٍ كَانَتْ لَهُ قُوَّةُ الْقَرَابَةِ فِي ظَاهِرِ الرِّوَايَةِ قِيَاسًا عَلَى
خَالَةِ لِأَبٍ مَعَ كَوْنِهَا وَلَدُ دِي الرَّحِمِ تَكُونُ هِيَ أُولَى
لِقُوَّةِ الْقَرَابَةِ مِنَ الْخَالَةِ لِأَمٍّ مَعَ كَوْنِهَا وَلَدُ الْوَارِثِ لِأَنَّ التَّرْجِيحَ
بِمَعْنَى فِيهِ وَهُوَ قُوَّةُ الْقَرَابَةِ أُولَى مِنَ التَّرْجِيحِ فِي غَيْرِهِ وَهُوَ
الْأَدْلَى بِالْوَارِثِ وَقَالَ بَعْضُهُمُ الْهَالُ كُكُلُهُ لِبَنَتِ الْعَمِّ لِأَنَّهَا
وَلَدُ الْعَصْبَةِ وَإِنْ اسْتَوَوْا فِي الْقُرْبِ وَلَكِنْ اخْتَلَفَ حَيْزُ قَرَابَتِهِمْ
لَا عِتْبَارَ هُنَا لِقُوَّةِ الْقَرَابَةِ وَلَا لَوَلَدِ الْعَصْبَةِ فِي ظَاهِرِ الرِّوَايَةِ
قِيَاسًا عَلَى عَمَّةٍ لِأَبٍ وَأُمٍّ مَعَ كَوْنِهَا ذَاتُ الْقَرَابَتَيْنِ وَوَلَدُ الْوَارِثِ
مِنَ الْجِهَتَيْنِ وَامْهَازَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأُولَى مِنَ الْخَالَةِ

لَابٍ وَأُمِّ أَوْلَادٍ أَوْلَامٍ فَإِنْ كَانَ حَيْزُ قَرَابَتِهِمْ مُخْتَلِفًا فَلَا
 اِعْتِبَارَ بِرَلْقَوَةِ الْقَرَابَةِ كَعَمَّةٍ لِّلْأَبِ وَأُمِّ وَخَالَ لِّلْأُمِّ أَوْ خَالَ لِّلْأَبِ وَأُمِّ
 وَعَمَّةٍ لِّلْأُمِّ فَالْثَلَاثَانِ لِقَرَابَةِ الْأَبِ وَهُوَ نَصِيبُ الْأَبِ وَالْثَلَاثُ
 لِقَرَابَةِ الْأُمِّ وَهُوَ نَصِيبُ الْأُمِّ ثُمَّ مَا أَصَابَ كُلَّ فَرِيقٍ يُقَسَّمُ بَيْنَهُمْ
 كَمَا لَوْ اتَّحَدَ حَيْزُ قَرَابَتِهِمْ

فَصْلٌ فِي أَوْلَادِهِمْ وَأَحْكَامِهِمْ

الْحُكْمُ فِيهِمْ كَالْحُكْمِ فِي الصِّنْفِ الْأَوَّلِ اعْنِي أَوْلَاهُمْ
 بِالْهَيَرَاتِ أَقْرَبُهُمْ إِلَى الْهَيْتِ مِنْ أَيِّ جِهَةٍ كَانَ وَإِنْ اسْتَوَوْا
 فِي الْقُرْبِ وَكَانَ حَيْزُ قَرَابَتِهِمْ مُتَّحِدًا فَمِنْ كَانَ لَهُ قُوَّةُ
 الْقَرَابَةِ فَهُوَ أَوْلَى بِالْإِجْمَاعِ وَإِنْ اسْتَوَوْا فِي الْقُرْبِ وَالْقَرَابَةِ وَكَانَ
 حَيْزُ قَرَابَتِهِمْ مُتَّحِدًا فَوَلَدُ الْعَصْبَةِ أَوْلَى مِنْهُنَّ لَا يَكُونُ كَبْنِ

بنت ابن اخ لابوام بنت ابن اخ لاب بنت ابن اخ لام
الْهَالُ كُلُّهُ لِبْنْتِ ابْنِ الْاَخِ لَابٍ وَاُمِّ بِالْاِتِّفَاقِ لِأَنَّهَا وَلَدُ الْعَصْبَةِ
وَلَهَا أَيْضًا قُوَّةُ الْقَرَابَةِ

فصل في الصنف الرابع

الْحَكْمُ فِيهِمْ أَنَّهُ إِذَا انْفَرَدَ وَاحِدُهُمْ اسْتَحَقَّ الْهَالُ كُلُّهُ
لِعَدَمِ الْبِرَاحِمِ وَإِذَا اجْتَبَعُوا وَكَانَ حِزْقًا قَرَابَتِهِمْ مُتَّحِدًا
كَالْعَمَاتِ وَالْأَعْمَامِ لَأَمِّ أَوِ الْإِخْوَالِ وَالْخَالَاتِ فَلَا قُوَّةَ مِنْهُنَّ
أُولَى بِالْإِجْمَاعِ أَعْنِي مَنْ كَانَ لِأَبٍ وَأُمِّ أُولَى مِمَّنْ كَانَ
لِأَبٍ وَمَنْ كَانَ لِأَبٍ أُولَى مِمَّنْ كَانَ لِأُمِّ ذُكُورًا كَانُوا وَإِنَّا
وَأَن كَانُوا ذُكُورًا وَإِنَّا وَاسْتَوَتْ قَرَابَتُهُمْ فَلِلذَكَرِ مِثْلُ
حَقِّ الْأُنثَى كَعَمِّ وَعَمَّةٍ كَالْهَالِ أَوْ خَالٍ وَخَالَةٍ كَالْهَالِ

اخ لابوام اخ لاب اخ لام اخت لابوام اخت لاب اخت لام
بنت بنت بنت ابن بنت ابن بنت ابن بنت

عَنْدَ أَبِي يُوسُفَ يَقْسَمُ كُلُّ الْهَالِ بَيْنَ فُرُوعِ بَنِي الْأَعْيَانِ ثُمَّ

بَيْنَ فُرُوعِ بَنِي الْعَلَاتِ ثُمَّ بَيْنَ فُرُوعِ بَنِي الْأَخْيَافِ لِلذِّكْرِ

مِثْلَ حَظِّ الْأُنثِيِّينَ أَرْبَاعًا بِاعْتِبَارِ الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَجُلِهِ

الْمُتَقَسِّمُ ثُلُثُ الْهَالِ بَيْنَ فُرُوعِ بَنِي الْأَخْيَافِ عَلَى التَّسْوِيَةِ

أَثَلَاثًا بِاعْتِبَارِ اسْتِوَاءِ أَصُولِهِمْ فِي قِسْمَةِ الْأَبَاءِ وَالنَّاتِيِّ بَيْنَ

فُرُوعِ بَنِي الْأَعْيَانِ أَنْصَافًا بِاعْتِبَارِ عَدَدِ الْفُرُوعِ فِي الْأَصُولِ

نِصْفُهُ لِبَنَاتِ الْأَخِ نَصِيبُ أَبِيهَا وَالنِّصْفُ الْأُخْرَيْنِ وَلَدَيَّ

الْأَخْتِ لِلذِّكْرِ مِثْلُ حَظِّ الْأُنثِيِّينَ بِاعْتِبَارِ الْأَبْدَانِ وَتَصَرُّحُ

مَنْ تَسْعَةٍ وَلَوْ تَرَكَ ثَلَاثَ بَنَاتِ بَنِي إِخْوَةٍ مُتَفَرِّقِينَ

بِهَذِهِ الصُّورَةِ

باعتبار لأصول وإن استووا في القرب وليس فيهم ولد عصبة

أو كان كلهم أولاد العصبات أو كان بعضهم أولاد العصبات

وبعضهم أولاد أصحاب الفرائض واختلفت قرابتهم

فابو يوسف رحمه الله يعتبر الأقوي ومحمد رحمه الله يقسم

المال على الإخوة والأخوات نصفين مع اعتبار عدد الفروع

والجهات في الأصول فما أصاب كل فريق يقسم بين فروعه

كما في الصنف الأول كبنات بنت الأخت لأب وأم أولى من

ابن بنت الأخ لأب عند أبي يوسف رحمه الله لقوة القرابة

وعند محمد رحمه الله يقسم المال بينها نصفين باعتبار

الأصول كما إذا ترك ثلاث بنات أخوة متفرقين وثلاث

بنين وثلاث بنات أخوات متفرقات بهذه الصورة

الْأَوَّلُ وَإِنْ اِخْتَلَفَتْ قَرَابَتُهُمْ فَالثَّلَاثَانِ لِقَرَابَةِ الْآبِ وَهُوَ نَصِيبُ

الْآبِ وَالثَّلَاثُ لِقَرَابَةِ الْأُمِّ وَهُوَ نَصِيبُ الْأُمِّ ثُمَّ مَا أَصَابَ كُلَّ

فَرِيقٍ يَقْسَمُ بَيْنَهُمْ كَمَا لَوْ اتَّحَدَتْ قَرَابَتُهُمْ

فَصْلٌ فِي الصِّنْفِ الثَّالِثِ

الْحُكْمُ فِيهِمْ كَالْحُكْمِ فِي الصِّنْفِ الْأَوَّلِ اعْنِي أَوْلَاهُمْ

بِالْهِيرَاثِ أَقْرَبُهُمْ إِلَيَّ الْهَيْتِ وَأَنْ اسْتَوَوْا فِي الْقُرْبِ فَوَلَدُ

الْعَصْبَةِ أَوْلَى مِنْ وَلَدِ وَي الْأَرْحَامِ كَبُنْتُ ابْنَ أَخٍ وَابْنُ

بِنْتِ أَخْتِ كَلَا هُمَا لِأَبٍ وَأُمٍّ أَوْ لِأَبٍ وَاحِدٍ هُمَا لِأَبٍ وَأُمٍّ وَالْآخِرُ

لِأَبٍ الْهَالُ كُلُّهُ لِبِنْتِ ابْنِ الْأَخِ لِأَنَّهَا وَلَدُ الْعَصْبَةِ وَلَوْ كَانَ

لَا مَ بَيْنَهُمَا لِلدَّ كَرَمِثْلِ حَظِّ الْأُنثَيَيْنِ عِنْدَ أَبِي يُوسُفَ رَحِمَهُ

اللَّهُ اثْلَاثًا بِاعْتِبَارِ الْبَدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ انْصَافًا

فَصْلٌ فِي الصَّنْفِ الثَّانِي

أَوَّلَهُمْ بِالْبِيرَاتِ أَقْرَبَهُمْ إِلَى الْهَيْتِ مِنْ أَيِّ جِهَةٍ كَانَ
وَعِنْدَ الْمُسْتَوَاءِ فِي دَرَجَاتِ الْقُرْبِ فَمَنْ كَانَ يَدُ لِي إِلَيَّ
الْهَيْتِ بِوَارِثٍ فَهُوَ أَوْلَى عِنْدَ أَبِي سَهْلٍ الْفَرَّابِضِيِّ وَ
أَبِي قُضَيْلٍ الْخَصَّافِ وَعَلِيِّ ابْنِ عَيْسَى الْبَصْرِيِّ وَلَا تَفْضِيلَ
لِعِنْدَ أَبِي سَلِيمَانَ الْجُرْجَانِيِّ وَأَبِي عَلِيٍّ الْبَيْهَقِيِّ الْبُسْتِيِّ
وَإِنْ اسْتَوَتْ مَنَازِلُهُمْ وَلَيْسَ فِيهِمْ مَنْ يَدُ لِي بِوَارِثٍ أَوْ كَانَ
كُلُّهُمْ يَدُ لِي بِوَارِثٍ فَإِنْ اتَّفَقَتْ صِفَةُ مَنْ يَدُ لِي وَاتَّحَدَتْ
قَرَابَتُهُمْ فَالْقِسْمَةُ عَلَيَّ أَبَدَانِهِمْ وَإِنْ اخْتَلَفَتْ صِفَةُ مَنْ يَدُ لِي
بِهِمْ يُقْسَمُ الْهَالُ عَلَيَّ أَوَّلَ بَطْنٍ اخْتَلَفَ كَمَا فِي الصَّنْفِ

مُحَمَّدٌ رَحِمَهُ اللَّهُ يَعْتَبِرُ الْجِهَاتِ فِي الْأَصُولِ كَمَا إِذَا تَرَكَ

بَنَّتِي بِنْتُ بِنْتٍ وَهِيَ أَيْضًا بِنْتُ ابْنِ بِنْتٍ وَابْنِ بِنْتِ بِنْتٍ

بِهَذِهِ الصُّورَةِ

بِنْتُ	بِنْتُ	بِنْتُ
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بِنْتُ	ابْنُ	بِنْتُ
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ابْنُ	بَنَّتَيْنِ
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عِنْدَ أَبِي يُوسُفَ الْهَالِ بَيْنَهُمْ اثَلَاثَاوَحْ صَارَ الْهَيْتُ كَأَنَّهُ تَرَكَ

أَرْبَعَ بَنَاتٍ وَأَبْنًا فَيَكُونُ ثَلَاثًا لِلْبَنَّتَيْنِ وَثَلَاثًا لِلْأَبْنِ وَعِنْدَ

مُحَمَّدٍ رَحِمَهُ اللَّهُ الْهَالِ بَيْنَهُمْ عَلَيَّ ثَابِتِيَّةٍ وَعِشْرِينَ سَهًا

لِلْبَنَّتَيْنِ اثْنَانِ وَعِشْرُونَ سَهًا سِتَّةَ عَشَرَ مِنْ قَبْلِ أَبِيهَا

وَسِتَّةَ أَصْحَابٍ مِنْ قَبْلِ أُمِّهَا وَالْأَبْنِ سِتَّةَ أَصْحَابٍ مِنْ قَبْلِ أُمِّهِ

ابْنِ الْبِنْتِ إِذْ هِيَ نَصِيبُ جَدِّهَا وَثَلَاثَةً سَبَاعِهِ وَهُوَ
 نَصِيبُ الْبَنَتَيْنِ يُقَسَّمُ عَلَيَّ وَلَدَيْهَا أَعْنِي فِي الْبَطْنِ
 الثَّلَاثِ انْصَافًا نِصْفُهُ لِبِنْتِ ابْنِ بِنْتِ الْبِنْتِ نَصِيبُ
 أَيْهَاو النَّصْفِ الْآخَرُ لَا بُنَيَّ بِنْتِ بِنْتِ الْبِنْتِ نَصِيبُ أَيْهَا
 وَتَصَحَّحَ مِنْ ثَنَائِيَّةٍ وَعِشْرِينَ وَقَوْلُ مُحَمَّدٍ رَحِمَهُ اللَّهُ أَشْهَرُ
 الرَّوَايَتَيْنِ عَنْ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ فِي جَمِيعِ أَحْكَامِ
 دَوِي الْأَرْحَامِ وَهُوَ قَوْلُ أَبِي يُوسُفَ الْأَوَّلِ ثُمَّ رَجَعَ فَقَالَ
 لَأَعْبُرَ لِلْأَصُولِ أَلْبَنَّةَ

فَصْلٌ

عَلِمْنَا وَنَا رَحِمَهُمُ اللَّهُ يَعْتَبِرُونَ الْجِهَاتِ فِي التَّوْرِيثِ غَيْرَانِ
 أَبَا يُوسُفَ رَحِمَهُ اللَّهُ يَعْتَبِرُ الْجِهَاتِ فِي أَبْدَانِ الْفُرُوعِ وَ

يَعْتَبَرُ أَبْدَانُ الْفُرُوعِ إِنْ أَتَعَتْ صِفَةُ الْأَصُولِ مَوَاقِعَهَا

وَيَعْتَبَرُ أَبْدَانُ الْأَصُولِ إِنْ اخْتَلَفَتْ صِفَاتُهُمْ وَيُعْطَى الْفُرُوعُ

مِيرَاثُ الْأَصُولِ مُخَالَفَاتُهَا إِذَا تَرَكَ ابْنُ بِنْتٍ وَبِنْتُ بِنْتٍ

عِنْدَ هَذَا الْهَالِ بَيْنَهَا لِلذَّكَرِ مِثْلُ خَطِّ الْأُنثِيِّينَ بِاعْتِبَارِ

الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ كَذَلِكَ لِأَنَّ صِفَةَ الْأَصُولِ

مُتَّفِقَةٌ وَلَوْ تَرَكَ بِنْتُ ابْنٍ بِنْتٍ وَابْنُ بِنْتٍ بِنْتٍ عِنْدَهَا

الْهَالُ بَيْنَ الْفُرُوعِ اثْلَاثًا بِاعْتِبَارِ الْأَبْدَانِ ثَلَاثًا لِلذَّكَرِ

وِثْلَةً لِلْأُنثَى وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ عَلَيْهِ الْهَالُ بَيْنَ

الْأَصُولِ أَعْنِي فِي الْبَطْنِ الثَّانِي اثْلَاثًا ثَلَاثًا لِبِنْتِ ابْنٍ

الْبِنْتِ نَصِيبُ أَبِيهَا وَثَلَاثَةً لِابْنِ بِنْتِ الْبِنْتِ نَصِيبُ أُمِّهِ

فُرْعُهُ وَفُرْعُهُ أُولَى مِنْ أَصْلِهِ

فَصْلٌ فِي الصَّنْفِ الْأَوَّلِ

أُولَهُمْ بِالْهَيْرَاتِ أَقْرَبُهُمْ إِلَيَّ الْهَيْتِ كَبُنْتُ الْبِنْتُ فَأَتَتْهَا
أُولَى مِنْ بِنْتِ بِنْتِ الْإِبْنِ وَإِنْ اسْتَوَوْا فِي الدَّرَجَةِ فَوَلَدُ
الْوَارِثِ أُولَى مِنْ وَلَدِ دَوِي الْأَرْحَامِ كَبُنْتُ بِنْتُ الْإِبْنِ
أُولَى مِنْ ابْنِ بِنْتِ الْبِنْتِ وَإِنْ اسْتَوَتْ دَرَجَاتُهُمْ وَلَمْ يَكُنْ
فِيهِمْ وَلَدُ الْوَارِثِ أَوْ كَانَ كُتُّهُمْ وَلَدُ الْوَارِثِ فَعِنْدَ
أَبِي يُوسُفَ رَحِمَهُ اللَّهُ وَالْحَسَنُ بْنُ زِيَادٍ يَعْتَبِرُ أَبْدَانُ
الْعُرُوعِ وَيُقَسَّمُ الْهَالُ عَلَيْهِمْ سَوَاءٌ تَعَقَّتْ صِنْفُهُ الْأَصُولُ
فِي الذُّكُورَةِ وَالْأُنثَى أَوْ اخْتَلَفَتْ وَمُحَمَّدٌ رَحِمَهُ اللَّهُ

يُنْتَهِي إِلَى جَدِّي الْهَيْتِ أَوْ جَدَّتَيْهِ وَهِيَ الْعَمَاتُ وَالْأَعْمَامُ

لَأُمِّ وَالْأَخْوَالِ وَالْخَالَاتِ فَهَؤُلَاءِ وَكُلُّ مَنْ يَدُلِّي إِلَى الْهَيْتِ

بِهِمْ مِنْ ذَوِي الْأَرْحَامِ رَوَى أَبُو سَلِيحَانَ عَنْ مُحَمَّدِ بْنِ

الْحَسَنِ عَنْ أَبِي حَنِيفَةَ رَحِمَهُمُ اللَّهُ إِنْ أَقْرَبَ الْأَصْنَافِ

الصَّنْفُ الثَّانِي وَإِنْ عَلَوْا ثُمَّ الْأَوَّلُ وَإِنْ سَقَلُوا ثُمَّ الثَّالِثُ

وَإِنْ نَزَلُوا ثُمَّ الرَّابِعُ وَإِنْ بَعْدَ وَارَوَى أَبُو يُونُسَ وَالْحَسَنُ

بْنُ زَبَادٍ عَنْ أَبِي حَنِيفَةَ رَحِمَهُمُ اللَّهُ إِنْ أَقْرَبَ الْأَصْنَافِ

الْأَوَّلُ ثُمَّ الثَّانِي ثُمَّ الثَّالِثُ ثُمَّ الرَّابِعُ كَثَرَتِيبُ الْعَصَبَاتِ

وَهُوَ الْبَاقُونَ لِلْفُقَرَى وَعِنْدَ هَذَا الصَّنْفُ الثَّالِثُ مُقَدَّمٌ

عَلَى الْجَدَّابِ لِأَنَّ عِنْدَ هَذَا كُلِّ وَاحِدٍ مِنْهُمْ أُولَى مِنْ

بَابُ ذَوِي الْأَرْحَامِ

وَذُو الرِّحِمِ هُوَ كُلُّ قَرِيبٍ لَيْسَ بِذِي سَهْمٍ وَلَا عَصَبَةٍ كَانَتْ
عَامَّةُ الصَّحَابَةِ يَرَوْنَ تَوْرِيثَ ذَوِي الْأَرْحَامِ بِهِ قَالَ أَصْحَابُنَا
وَمَنْ تَابَعَهُمْ رَحِمَهُمُ اللَّهُ تَعَالَى وَقَالَ زَيْدُ بْنُ ثَابِتٍ رَضِيَ اللَّهُ
عَنْهُ لَا مِيرَاثَ لِدَوِي الْأَرْحَامِ وَيُوضَعُ الْهَالُ فِي بَيْتِ الْهَالِ
وَبِهَذَا مَا لَكَ وَالشَّافِعِيُّ رَحِمَهَا اللَّهُ تَعَالَى وَذَوِي الْأَرْحَامِ
أَصْنَافُ أَرْبَعَةٌ الصِّنْفُ الْأَوَّلُ يَنْتَهِي إِلَى الْبَيْتِ وَهُمْ أَوْلَادُ
الْبَنَاتِ وَأَوْلَادُ بَنَاتِ الْإِبْنِ وَالصِّنْفُ الثَّانِي يَنْتَهِي إِلَيْهِمْ
الْبَيْتُ وَهُمْ الْأَجْدَادُ السَّاقِطُونَ وَالْجَدَّاتُ السَّاقِطَاتُ
وَالصِّنْفُ الثَّلَاثُ يَنْتَهِي إِلَى أَبَوَيْ الْبَيْتِ وَهُمْ أَوْلَادُ
الْأَخَوَاتِ وَبَنَاتُ الْإِخْوَةِ وَبَنَاتُ الْإِخْوَةِ لَيْمَ وَالصِّنْفُ الرَّابِعُ

المبائلة ما في يده من التصحيح الاول علي التصحيح

الثاني فلاحاجة الي الضرب وان لم يستقم فانظر ان كان

بينها موافقة فاضرب وفق التصحيح الثاني في جميع

التصحيح الاول وان كان بينها مباينة فاضرب كل

التصحيح الثاني في كل التصحيح الاول فالبلغ مخرج

السلتين نساهم ورثة الهيت الاول يضرب في المضروب

اعني في التصحيح الثاني اوفي وفقه وساهم ورثة الهيت

الثاني يضرب في كل ما في يده اوفي وفقه وان مات

ثالث اواربع فاجعل الببلغ الثاني مقام الاول والثالث

مقام الثاني في العمل ثم في اربع والخامس كذلك

إلي غير النهاية

وَتَعُولُ إِلَى تِسْعَةٍ وَتَصَحَّحَ مِنْ سَبْعَةٍ وَعَشْرِينَ إِنَّهَا سَبِيتَ
أَكْدَرِيَّةَ لِأَنَّهَا وَاقِعَةٌ فِي أَمْرَاءِ مِنْ بَنِي أَكْدَرٍ وَلَوْ كَانَ
مَكَانَ الْأَخْتِ أَخٌ أَوْ اخْتَانٌ فَلَا عَوْلَ وَلَا أَكْدَرِيَّةَ

بَابُ الْهِنَاسَخَةِ

وَلَوْ صَارَ بَعْضُ الْأَنْصَبَاءِ مِيرَاثًا قَبْلَ الْقِسْمَةِ كَزَوْجٍ وَبْنَتٍ
وَأَمَ فَمَاتَ الزَّوْجُ قَبْلَ الْقِسْمَةِ عَنِ امْرَأَةٍ وَأَبَوَيْنِ ثُمَّ مَاتَتِ
الْبْنَتُ عَنِ ابْنَيْنِ وَبْنَتٍ وَجَدَّةٍ ثُمَّ مَاتَتِ الْجَدَّةُ عَنِ زَوْجٍ

وَأَخَوَيْنِ الْأَصْلُ فِيهِمَا تَصَحَّحَ مَسْئَلَةُ الْهَيْتِ الْأُولَى وَتُعْطَى

سَهْمَ كُلِّ وَارِثٍ مِنْ هَذَا لِتُصَحِّحَ ثُمَّ تَصَحَّحَ مَسْئَلَةُ

الْهَيْتِ الثَّانِي وَتَنْظَرُ بَيْنَ مَا فِي يَدِهِ مِنَ التَّصْحِيحِ الْأُولَى

وَبَيْنَ التَّصْحِيحِ الثَّانِي إِلَى ثَلَاثَةِ أَحْوَالٍ فَإِنْ اسْتَقَامَ بِسَبَبِ

لَابِ وَأُمِّ وَأَمَّا سُدُسُ جَمِيعِ الْهَالِ كَجَدِّ وَجَدَّةٍ وَبِنْتٍ وَأَخَوَيْنِ
وَإِذَا كَانَ ثُلُثُ الْبَاقِي خَيْرًا لِلْجَدِّ وَلَيْسَ لِلْبَاقِي ثُلُثٌ
صَحِيحٌ فَاضْرِبْ مَخْرَجَ الثُّلُثِ فِي أَصْلِ الْهَسْنَةِ فَإِنْ تَرَكْتَ
جَدًّا وَزَوْجًا وَبِنْتًا وَأُمًّا وَأَخْتًا لَابٍ وَأُمِّ أُولَابٍ فَالسُّدُسُ خَيْرٌ
لِلْجَدِّ وَتَعُولُ الْهَسْنَةُ إِلَى ثَلَاثَةِ عَشْرٍ وَلَا شَيْءَ لِلْأَخْتِ
وَاعْلَمْ أَنَّ زَيْدَ بْنَ ثَابِتٍ رَضِيَ اللَّهُ عَنْهُ لَا يَجْعَلُ الْأَخْتَ
لَابٍ وَأُمِّ أُولَابٍ صَاحِبَةً فَرَضَ مَعَ الْجَدِّ الْإِنْفِ الْهَسْنَةَ
الْأَكْثَرَ يَقُوهِي زَوْجٌ وَأُمٌّ وَجَدُّوْا خْتُ لَابٍ وَأُمِّ أُولَابٍ لِلزَّوْجِ
النِّصْفَ وَلِلْأُمِّ الثُّلُثَ وَلِلْجَدِّ السُّدُسَ وَلِلْأَخْتِ النِّصْفَ
ثُمَّ يَضُمُّ الْجَدُّ نَصِيبَهُ إِلَى نَصِيبِ الْأَخْتِ فَيُقَسَّمَانِ لِلذَّكَرِ
مِثْلَ خَطَايَا نَثِيْبَيْنِ لِأَنَّ الْهَقَاسَةَ خَيْرٌ لِلْجَدِّ أَصْلُهَا مِنْ سِتَّةٍ

بَنُو الْعَلَاتِ يَدْ خُلُونِ فِي الْقِسْمَةِ مَعَ بَنِي الْأَعْيَانِ
إِضْرَارًا لِلْجَدِّ فَإِذَا أَخَذَ الْجَدُّ نَصِيبَهُ فَبَنُو الْعَلَاتِ يَخْرُجُونَ
مِنَ الْبَيْنِ خَائِبِينَ بِغَيْرِ شَيْءٍ وَالْبَاقِي لِبَنِي الْأَعْيَانِ
إِلَّا إِذَا كَانَتْ مِنْ بَنِي الْأَعْيَانِ أُخْتُ وَاحِدَةٌ أَخَذَتْ
فَرَضَهَا عَنِّي الْكُلَّ بَعْدَ نَصِيبِ الْجَدِّ فَإِنْ بَقِيَ شَيْءٌ
فَلِبَنِي الْعَلَاتِ وَالْأَفْلَاشِ لَهُمْ وَذَلِكَ كَجَدِّ وَاخْتِ
لِابِّ وَأُمِّ وَأُخْتَيْنِ لِابِّ فَبَقِيَ لِلْأُخْتَيْنِ لِابٌّ عَشْرَ أِهَالٍ وَ
تَصَحَّ مِنْ عِشْرِينَ وَلَوْ كَانَتْ فِي هَذِهِ الْهَسْبَةِ اخْتُ لِابِّ
لَمْ يَبْقَ لَهَا شَيْءٌ وَإِذَا اخْتَلَطَ بِهِمْ ذَوْسَمٌ فَلِلْجَدِّ هَهُنَا أَفْضَلُ
الْأُمُورِ الثَّلَاثَةُ بَعْدَ فَرَضِ ذِي سَهْمٍ أَمَّا لِهَقَاسَةِ كَزُوجِ
وَجَدِّ وَاخٍ وَأَمَّا ثَلَاثُ مَا يَبْقَى كَجَدِّ وَجَدَّةٍ وَاخْوَيْنِ وَإِذَا

مَنْ لَا يَرُدُّ عَلَيْهِ فَإِنْ انْكَسَرَ عَلَيَّ الْبَعْضُ صَحَّحَ
الْهَسْبَةُ بِالْأَصُولِ الْمَذْكُورَةِ

أَبْ مَقَاسَةِ الْجَدِّ

ثَالِ أَبُو بَكْرٍ الصِّدِّيقُ رَضِيَ اللَّهُ عَنْهُ وَ مَنْ تَابَعَهُ مِنْ
الصَّحَابَةِ بَنُوا الْأَعْيَانِ وَ بَنُوا الْعَلَاتِ لَا يَرْتُونَ مَعَ الْجَدِّ وَ هَذَا
قَوْلُ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَ بِهِ يُقْتَنَى وَقَالَ زَيْدُ بْنُ ثَابِتٍ
يَرْتُونَ مَعَ الْجَدِّ وَ هُوَ قَوْلُهَا وَقَوْلُ مَالِكٍ وَ الشَّافِعِيِّ
رَحِمَهُمُ اللَّهُ تَعَالَى وَ عِنْدَ زَيْدِ بْنِ ثَابِتٍ رَحِمَهُ اللَّهُ تَعَالَى
عَلَيْهِ لِلْجَدِّ مَعَ بَنِي الْأَعْيَانِ وَ الْعَلَاتِ أَفْضَلُ الْأَمْرَيْنِ
مِنَ الْهَسْبَةِ وَ مِنْ ثَلَاثِ جَمِيعِ الْهَالِ وَ تَفْسِيرُ الْهَسْبَةِ
أَنْ يُجَدَلَ الْجَدُّ فِي الْقِسْمَةِ كَأَحَدٍ مِنَ الْأَخُوَّةِ وَ

عَدَدِ رُوسِهِمْ فِي مَخْرَجِ فَرَضٍ مَنْ لَا يَرِدُ عَلَيْهِ فَالْمَبْلَغُ مِنْهَا

تُصَحِّحُ الْمَسْئَلَةَ وَالرَّابِعُ أَنْ يَكُونَ مَعَ الثَّانِي مَنْ لَا يَرِدُ عَلَيْهِ

فَاتَّسَمَ مَا بَقِيَ مِنْ مَخْرَجِ فَرَضٍ مَنْ لَا يَرِدُ عَلَيْهِ عَلَيَّ

مَسْئَلَةٌ مَنْ يَرِدُ عَلَيْهِ فَإِنْ اسْتَقَامَ الْبَاقِي فِيهَا وَهَذَا فِي

صُورَةٍ وَاحِدَةٍ وَهِيَ أَنْ يَكُونَ لِلزَّوْجَاتِ الرَّبْعُ وَيَكُونَ

الْبَاقِي بَيْنَ أَهْلِ الرَّدِّ ثَلَاثًا كَزَوْجَةٍ وَجَدَّةٍ وَأَخْتَيْنِ

لَمْ وَإِنْ لَمْ يَسْتَقِمْ فَاضْرِبْ جَمِيعَ مَسْئَلَةٍ مَنْ يَرِدُ عَلَيْهِ فِي

مَخْرَجِ فَرَضٍ مَنْ لَا يَرِدُ عَلَيْهِ فَالْمَبْلَغُ مَخْرَجِ فَرُوضِ

الْقَرِيبَيْنِ كَأَرْبَعِ زَوْجَاتٍ وَثَلَاثِ بَنَاتٍ وَبَنَاتٍ جَدَّاتِ

ثُمَّ اضْرِبْ سِهَامَ مَنْ لَا يَرِدُ عَلَيْهِ فِي مَسْئَلَةٍ مَنْ يَرِدُ عَلَيْهِ

وَسِهَامَ كُلِّ مَنْ يَرِدُ عَلَيْهِ فِيهَا بَقِيَ مِنْ مَخْرَجِ فَرَضٍ

وَالثَّانِي إِذَا اجْتَمَعَ فِي الْهَسْبَةِ جِنْسَانِ أَوْ ثَلَاثَةُ أَجْنَاسٍ
مِمَّنْ يَرَدُّ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَا يَرَدُّ عَلَيْهِ فَاجْعَلِ الْهَسْبَةَ
مِنْ سَهْمِهِمْ أَعْنَى مِنْ اثْنَيْنِ إِنْ كَانَ فِي الْهَسْبَةِ سُدْسَانِ
أَوْ مِنْ ثَلَاثَةٍ إِذَا كَانَ فِيهَا ثُلُثٌ وَ سُدْسٌ أَوْ مِنْ أَرْبَعَةٍ
إِذَا كَانَ فِيهَا نِصْفٌ وَ سُدْسٌ أَوْ مِنْ خَمْسَةٍ إِذَا كَانَ فِيهَا
ثُلُثَانِ وَ سُدْسٌ أَوْ نِصْفٌ وَ سُدْسَانِ أَوْ نِصْفٌ وَ ثُلُثٌ وَ الثَّالِثُ
أَنْ يَكُونَ مَعَ الْأَوَّلِ مَنْ لَا يَرَدُّ عَلَيْهِ فَاعْطِ فَرْضَ مَنْ لَا يَرَدُّ
عَلَيْهِ مِنْ أَقَلِّ مَخَارِجِهِ فَإِنْ اسْتَقَامَ الْبَاقِي عَلَى رُوسٍ
مَنْ يَرَدُّ عَلَيْهِ فِيهَا كَزَوْجٍ وَ ثَلَاثِ بَنَاتٍ وَإِنْ لَمْ يَسْتَقِمْ فَاضْرِبْ
وَقْفَ رُوسِهِمْ فِي مَخْرَجِ فَرْضِ مَنْ لَا يَرَدُّ عَلَيْهِ أَنْ وَافَقَ
رُوسَهُمُ الْبَاقِي كَزَوْجٍ وَ سِتِّ بَنَاتٍ وَ إِلَّا فَاضْرِبْ كُلَّ

بَابُ الرِّدِّ أَلَرِّدُضُّدُ الْعَوْلِ

وَهُوَ نِيهَا قَضَلَ عَنْ فَرَضِ ذَوِي الْفَرُوضِ وَلَا مُسْتَحَقَّ لَهُ
يُرَدُّ ذَلِكَ عَلَى ذَوِي الْقُرُوضِ بِقَدْرِ حُقُوقِهِمْ إِلَّا عَلَى
الزَّوْجَيْنِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ كَعَلِيٍّ وَمَنْ تَابَعَهُ
رَضِيَ اللَّهُ عَنْهُمْ وَبِهِ أَخَذَ أَصْحَابُنَا رَحِمَهُمُ اللَّهُ وَقَالَ زَيْدُ
بْنُ ثَابِتٍ لَا يُرَدُّ الْقَاضِ بَلْ هُوَ لِبَيْتِ الْهَالِ وَبِهِ أَخَذَ
عُرْوَةُ وَالزَّهْرِيُّ وَمَالِكٌ وَ الشَّافِعِيُّ رَحِمَهُمُ اللَّهُ تَعَالَى
ثُمَّ مَسَابِلُ الْبَابِ أَقْسَامُ أَرْبَعَةٌ أَحَدُهَا أَنْ يَكُونَ فِي
الْهَبْلَةِ جِنْسٌ وَاحِدٌ مِمَّنْ يُرَدُّ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَا يُرَدُّ
عَلَيْهِ فَاجْعَلِ الْهَبْلَةَ مِنْ رُؤْسِهِمْ كَمَا إِذَا تَرَكَ الْهَيْتُ
بِثْنَيْنِ أَوْ أُخْتَيْنِ أَوْ جَدَّتَيْنِ فَاجْعَلِ الْهَبْلَةَ مِنْ اثْنَيْنِ

بَيْنَهَا مَبَايِنَةٌ فَاضْرِبْ فِي كُلِّ التَّرَكَّةِ ثُمَّ اقْسِمِ الْحَاصِلَ
 عَلَيَّ جَمِيعِ تَصْحِيحِ الْهَسْبَةِ فَالْخَارِجِ نَصِيبَ ذَلِكَ
 الْفَرِيفِ فِي الْوَجْهَيْنِ وَ أَمَّا فِي قَضَاءِ الدَّيُونِ فَدَيْنُ
 كُلِّ غَرِيمٍ بِهَنْزِلَةٍ تَصْحِيحِ

فصل في التَّخَارِجِ

مَنْ صَالَحَ عَلَيَّ شَيْءٌ مِنَ التَّرَكَّةِ فَاطْرَحْ سَهَا مَهْ مِنْ
 التَّصْحِيحِ ثُمَّ اقْسِمِ بَاقِيَ التَّرَكَّةِ عَلَيَّ بِسَهْلِ الْبَاقِيْنَ
 كَزَوْجٍ وَامٍ وَ عِمٍّ فَصَالِحِ الزَّوْجِ عَلَيَّ بَاقِيَ ذِمَّتِهِ لِلزَّوْجَةِ
 مِنَ الْهَبْرِ وَخَرَجِ مِنَ الْبَيْنِ فَيُقَسَّمُ بَاقِيَ التَّرَكَّةِ بَيْنَ
 الْأُمِّ وَالْعَمِّ اثْلَاثًا بِقَدْرِ سَهْلِ مَهْيَا وَحْ يَكُونُ سَهْلَانِ لِلْأُمِّ
 وَ سَهْمٌ وَاحِدٌ لِلْعَمِّ

فَصَلِّ فِي تِسْمَةٍ لِّتَرِكَاتٍ بَيْنَ الْوَرِثَةِ وَالْغَرَمَاءِ

إِنْ كَانَ بَيْنَ التَّرِكَةِ وَالْتَّصْحِيحِ مَبَايِنَةٌ فَاضْرِبْ سِهَامَ كُلِّ

وَارِثٍ مِنَ التَّصْحِيحِ فِي جَمِيعِ التَّرِكَةِ ثُمَّ اقْسِمِ الْهَبْلُغَ عَلَيَّ

السَّحِيحِ وَإِذَا كَانَ بَيْنَ السَّحِيحِ وَالتَّرِكَةِ مُوَافَقَةٌ

فَاضْرِبْ سِهَامَ كُلِّ وَارِثٍ مِنَ التَّصْحِيحِ فِي وَفِّ التَّرِكَةِ

ثُمَّ اقْسِمِ الْهَبْلُغَ عَلَيَّ وَفِّ السَّحِيحِ فَالْخَارِجُ نَصِيبُ ذَلِكَ

الْوَارِثِ فِي الْوَجْهَيْنِ هَذَا إِنَّهَا هُوَ لِعَرَفَةِ نَصِيبِ كُلِّ

فَرْدٍ مِنَ الْوَرِثَةِ وَأَمَّا لِعَرَفَةِ نَصِيبِ كُلِّ فَرِيقٍ مِنْهُمْ

فَاضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْهَسْبَةِ فِي

وَفِّ التَّرِكَةِ ثُمَّ اقْسِمِ الْهَبْلُغَ الْحَاصِلَ عَلَيَّ وَفِّ

الْهَسْبَةِ إِنْ كَانَ بَيْنَ التَّرِكَةِ وَالْهَسْبَةِ مُوَافَقَةٌ وَإِنْ كَانَ

وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيبَ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ
الْفَرِيقِ مِنَ التَّنْصِيحِ فَاقْسِمْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ
أَصْلِ الْمَسْئَلَةِ عَلَى عَدَدِ رُوسِهِمْ ثُمَّ اضْرِبِ الْخَارِجَ فِي
الْمَضْرُوبِ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ
الْفَرِيقِ وَوَجْهٌ آخَرَانِ تَقْسِمُ الْمَضْرُوبَ عَلَى أَيِّ شَيْءٍ
ثُمَّ تَضْرِبُ الْخَارِجَ فِي نَصِيبِ الْفَرِيقِ الَّذِي قَسَمْتَ
عَلَيْهِمُ الْمَضْرُوبَ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ
ذَلِكَ الْفَرِيقِ وَوَجْهٌ آخَرٌ هُوَ طَرِيقُ النِّسْبَةِ وَهُوَ الْوَاضِحُ
فَهُوَ أَنْ يُنْسَبَ سِهَامُ كُلِّ فَرِيقٍ مِنْ أَصْلِ الْمَسْئَلَةِ إِلَى
عَدَدِ رُوسِهِمْ مَفْرَدًا ثُمَّ يُعْطَى بِمِثْلِ تِلْكَ النِّسْبَةِ مِنْ
الْمَضْرُوبِ لِكُلِّ وَاحِدٍ مِنْ أَحَادِ ذَلِكَ الْفَرِيقِ

الْبَلَّغُ فِي أَصْلِ الْهَسْلَةِ كَارْبَعِ زَوَاجَاتٍ وَثَنَائِي عَشْرَةَ بَنَاتٍ

وَخَمْسَ عَشْرَةَ جَدَّةً وَسِتَّةَ أَعْمَامَ وَالرَّابِعَ أَنْ تَكُونَ الْأَعْدَادُ

مُتَبَايِنَةً لَا يُوَافِقُ بَعْضُهَا بَعْضًا فَالْحَكْمُ فِيهَا أَنْ يُضْرَبَ أَحَدُ

الْأَعْدَادِ فِي جَمِيعِ الثَّنَائِي ثُمَّ يُضْرَبُ مَا بَلَغَ فِي جَمِيعِ

الثَّلَاثِ ثُمَّ مَا بَلَغَ فِي جَمِيعِ الرَّابِعِ ثُمَّ يُضْرَبُ مَا اجْتَمَعَ

فِي أَصْلِ الْهَسْلَةِ كَأَمْرٍ أَتَيْنَ وَسِتَّ جَدَّاتٍ وَعَشْرَةَ بَنَاتٍ

وَسَبْعَةَ أَعْمَامَ

فَصْلٌ

وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيبَ كُلِّ فَرِيقٍ مِنَ الْأَتْصَحِّحِ

فَاضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْهَسْلَةِ فِيهَا ضَرْبَتَهُ

فِي أَصْلِ الْهَسْلَةِ فَمَا حَصَلَ كَانَ نَصِيبُ ذَلِكَ الْفَرِيقِ

أَصْلُ الْهَسْلَةِ نَزْجٍ وَخَمْسِ أَخَوَاتٍ لِأَبٍ وَأُمٍّ وَأَمَّا الْأَرْبَعَةُ
فَأَحَدُهَا أَنْ يَكُونَ الْكُسْرُ عَلَى طَائِفَتَيْنِ أَوْ أَكْثَرٍ وَلَكِنْ
بَيْنَ أَعْدَادِ رُؤُسِهِمْ مِثْلُ ثَلَاثَةٍ فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَحَدُ
الْأَعْدَادِ فِي أَصْلِ الْهَسْلَةِ مِثْلُ سِتِّ بَنَاتٍ وَثَلَاثِ جَدَّاتٍ
وِثْلَاثَةِ أَعْمَامٍ وَالثَّانِي أَنْ يَكُونَ بَعْضُ الْأَعْدَادِ فِي بَعْضِهِ
مُتَدًا إِخْلًا فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَكْثَرُ الْأَعْدَادِ فِي
أَصْلِ الْهَسْلَةِ كَأَرْبَعِ زَوَاجَاتٍ وَثَلَاثِ جَدَّاتٍ وَائْتْنِي
عَشْرَةً وَالثَّلَاثُ أَنْ يُوَافِقَ بَعْضُ الْأَعْدَادِ بَعْضًا فَالْحُكْمُ
فِيهَا أَنْ يُضْرَبَ وَفَقَّ أَحَدُ الْأَعْدَادِ فِي جَمِيعِ الثَّانِي ثُمَّ
مَا بَلَغَ فِي وَفَقِ الثَّلَاثِ إِنْ وَافَقَ الْهَبْلُغُ الثَّلَاثَ وَالْإِ
فَالْهَبْلُغُ فِي جَمِيعِ الثَّلَاثِ ثُمَّ فِي الرَّابِعِ كَذَلِكَ ثُمَّ يُضْرَبُ

بَابُ التَّصْحِيحِ

يَحْتَاجُ فِي تَصْحِيحِ الْمَسَائِلِ إِلَى سَبْعَةِ أَصُولٍ ثَلَاثَةٌ مِنْهَا
بَيْنَ السَّهَامِ وَالرُّؤْسِ وَأَرْبَعَةٌ مِنْهَا بَيْنَ الرُّؤْسِ وَالرُّؤْسِ أَمَّا
الْثَلَاثَةُ فَأَحَدُهَا إِنْ كَانَ سَهَامُ كُلِّ فَرِيقٍ مُنْقَسِبَةً عَلَيْهِمْ
بِلا كَسْرِ فَلَا حَاجَةَ إِلَى الضَّرْبِ كَأَبَوَيْنِ وَبَنَتَيْنِ وَالثَّانِي
هُوَ أَنْ يَنْكَسَرَ عَلَى طَائِفَةٍ وَاحِدَةٍ نَصِيبُهُمْ وَلَكِنْ بَيْنَ سَهَامِهِمْ
وَرُؤُسِهِمْ مُوَافَقَةٌ فَيُضْرَبُ وَفَقْدُ عَدَدِ رُؤْسٍ مِنْ أَنْكَسَرَ
عَلَيْهِمُ السَّهَامُ فِي أَصْلِ الْمَسْئَلَةِ وَعَوْلُهَا إِنْ كَانَتْ عَابِلَةً
كَأَبَوَيْنِ وَعَشْرَ بَنَاتٍ أَوْ زَوْجٍ وَأَبَوَيْنِ وَسِتِّ بَنَاتٍ وَالثَّلَاثُ
أَنْ يَنْكَسَرَ سَهَامُهُمْ وَلَا يَكُونُ بَيْنَ سَهَامِهِمْ وَرُؤُسِهِمْ مُوَافَقَةٌ
فَيُضْرَبُ كُلُّ عَدَدِ رُؤْسٍ مِنْ أَنْكَسَرَ عَلَيْهِمُ السَّهَامُ فِي

الْعَدَدُ الْعَادِلُهَا مَخْرَجُ الْجُزْءِ الْوَقْفِ وَتَبَايُنُ الْعَدَدَيْنِ
 أَنْ لَا يَعْدَّ الْعَدَدَيْنِ الْمُخْتَلَفَيْنِ مَعًا عَدَدٌ ثَالِثٌ أَصْلًا
 كَالْتِسْعَةِ مَعَ الْعَشْرِ وَطَرِيقُ مَعْرِفَةِ الْهَوَاقِفِ وَالْمُبَايَنَةِ بَيْنَ
 الْإِقْدَارَيْنِ الْمُخْتَلَفَيْنِ أَنْ يَنْقُصَ مِنَ الْأَكْثَرِ بِإِقْدَارِ
 الْأَقَلِّ مِنَ الْخَانِبَيْنِ مَرَّةً أَوْ مَرَارًا حَتَّى اتَّفَقَا فِي دَرَجَةٍ
 وَاحِدَةٍ فَإِنْ اتَّفَقَا فِي وَاحِدَةٍ فَلَا وَفَقَ بَيْنَهُمَا وَإِنْ اتَّفَقَا فِي
 عَدَدٍ فَهُمَا مُتَوَا فَتَقَانِ فِي ذَلِكَ الْعَدَدِ فِي الْإِثْنَيْنِ
 بِالنِّصْفِ وَفِي الثَّلَاثَةِ بِالثُّلُثِ وَفِي الْأَرْبَعَةِ بِالرُّبْعِ هَكَذَا
 إِلَى الْعَشْرِ وَفِيهَا وَرَاءَ الْعَشْرِ يَتَوَا فَتَقَانِ بِجُزْءٍ أَعْنِي فِي
 أَحَدٍ عَشَرَ بِجُزْءٍ مِنْ أَحَدٍ عَشَرَ وَفِي خَمْسَةٍ عَشَرَ بِجُزْءٍ مِنْ
 خَمْسَةٍ عَشَرَ فَاعْتَبِرْ هَذَا

كَا مِرَاةٍ وَامٍ وَاخْتَيْنِ لِابٍ وَامٍ وَاخْتَيْنِ لِامٍ وَابْنٍ مَحْرُومٍ

بَابُ مَعْرِفَةِ التَّهَائُلِ وَالتَّدَاخُلِ

وَالْتَوَاقُفِ وَالتَّبَايُنِ بَيْنَ الْعَدَدَيْنِ

تَهَائُلُ الْعَدَدَيْنِ كَوْنُ أَحَدِ هُمَا مُسَاوِيَا لِلْآخَرِ

وَتَدَاخُلُ الْعَدَدَيْنِ أَنْ يُعَدَّ أَقْلُهُمَا أَلَا كَثَرُ أَيُّ يُغْنِيهِ

أَوْ نَقُولُ تَدَاخُلُ الْعَدَدَيْنِ هُوَ أَنْ يَكُونَ أَكْثَرُ الْعَدَدَيْنِ

مَنْقَسِبًا عَلَى الْأَقْلِ تَسْبِيَةً صَحِيحَةً أَوْ نَقُولُ هُوَ أَنْ زِيدَ عَلَى

الْأَقْلِ مِثْلُهُ أَوْ أَمْثَالُهُ فَيَسَاوِي الْأَكْثَرَ أَوْ نَقُولُ أَنْ يَكُونَ

الْأَقْلُ جُزْءَ الْأَكْثَرِ مِثْلُ ثَلَاثَةٍ وَتِسْعَةٍ وَتَوَاقُفُ الْعَدَدَيْنِ أَنْ

لَا يُعَدَّ أَقْلُهُمَا الْأَكْثَرُ وَلَكِنْ يُعَدُّ هُمَا عَدَدٌ ثَالِثٌ كَالْثَّمَانِيَةِ

مَعَ الْعِشْرِينَ يُعَدُّ هُمَا أَرْبَعَةً فَهِيَ مُتَوَاقِفَانِ بِالرَّبْعِ لِأَنَّ

بَابُ الْعَوْلِ

الْعَوْلُ أَنْ يَزَادَ عَلَيَّ لِمُخْرَجِ شَيْءٍ مِنْ أَجْرِنِ إِذَا ضَافَ

الْمُخْرَجُ عَنْ فَرْضٍ يَعْلَمُ أَنَّ مَجْمُوعَ الْمَخَارِجِ سَبْعَةٌ أَرْبَعَةٌ

مِنْهَا لَا تَعُولُ وَهِيَ الْإِثْنَانِ وَالثَّلَاثَةُ وَالْأَرْبَعَةُ وَالتَّهَائِيَةُ

وَالثَّلَاثَةُ مِنْهَا قَدْ تَعُولُ أَمَّا السَّنَةُ فَتَعُولُ إِلَى عَشْرٍ وَتَرَاوُ شُغْعًا

وَأَمَّا اثْنِي عَشَرَ فَيَتَعُولُ إِلَى سَبْعَةٍ عَشْرٍ وَتَرَاوُ شُغْعًا

وَأَمَّا أَرْبَعَةٌ وَعِشْرُونَ فَاتَّهَا تَعُولُ إِلَى سَبْعَةٍ وَعِشْرِينَ عَوْلًا

وَاحِدًا فِي الْمَسْبُوتَةِ الْهِنْدِيَّةِ وَهِيَ امْرَأَةٌ وَبِثْنَانٍ وَأَبْوَانٍ

وَلَا يَزَادُ عَلَيَّ هَذَا إِلَّا عِنْدَ ابْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ

فَإِنْ عِنْدَهُ تَعُولُ أَرْبَعَةٌ وَعِشْرُونَ إِلَى إِحْدَى وَثَلَاثِينَ

فَإِذَا جَاءَ فِي الْهَسَائِلِ مِنْ هَذِهِ الْقُرُوضِ أَحَادٌ أَحَادٌ
فَمُخْرَجٌ كُلُّ فَرَضٍ سِوَهُ إِلَّا النِّصْفَ فَإِنَّهُ مِنَ الْإِثْنَيْنِ
كَالرُّبْعِ مِنْ أَرْبَعَةٍ وَالثَّانِي مِنَ ثَلَاثَةٍ وَالثَّلَاثُ مِنْ
ثَلَاثَةٍ وَإِذَا جَاءَ مِثْنِي أَوْ ثَلَاثَ وَهُمَا مِنْ نَوْعٍ وَاحِدٍ فَكُلُّ
عَدَدٍ يَكُونُ مُخْرَجًا لِجِزْءٍ فَذَلِكَ الْعَدَدُ أَيْضًا مُخْرَجٌ
لِضِعْفِ ذَلِكَ الْجِزْءِ وَ لِضِعْفِ ضِعْفِهِ كَالسَّتَّةِ هِيَ
مُخْرَجٌ لِلدَّسِّسِ وَ لِضِعْفِهِ وَإِذَا اخْتَلَطَ النِّصْفُ مِنَ النَّوعِ
الْأَوَّلِ بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ سِتَّةٍ وَإِذَا اخْتَلَطَ
الرُّبْعُ بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ اثْنَيْ عَشَرَ وَإِذَا
اخْتَلَطَ الثَّانِي بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ أَرْبَعَتَيْنِ

الْثَّرَكَةُ وَالْثَّانِي الْأَقْرَبُ فَلَا قُرْبَ كَمَا ذَكَرْنَا فِي

العصبات والمحرم لا يحجب عندنا وعند ابن مسعود

رضي الله عنه يحجب حجب النقصان كما لكا في

والتا تل وال ل ر قيق والمحجوب يحجب بالاتفاف

كما لا ثنين من الإخوة والأخوات فصاعدا من أي جهة

كما نفا عنها لا ير ثان مع الأب لكن يحجبان الأم من

الثلث إلى السادس

بَابُ مَخَارِجِ الْفُرُوضِ

اعْلَمْ أَنَّ الْفُرُوضَ السِّتَّةَ الْهَذْ كُورَةَ فِي كِتَابِ اللَّهِ

تَعَالَى نَوَعَانِ الْأَوَّلُ النِّصْفُ وَالرَّبْعُ وَالثُّلُثُ وَالثَّانِي

الثَّلَاثَانِ وَالثَّلَاثُ وَالسُّدُسُ عَلَى التَّنْصِيفِ وَالتَّضْعِيفِ

بَابُ الْحُجُبِ

الْحُجُبُ عَلَى نَوَعَيْنِ حُجُبُ نَقْصَانٍ وَهُوَ حُجُبٌ عَنْ سَهْمٍ

إِلَى سَهْمٍ وَذَلِكَ لِحُمْسَةِ نَعْرِ لِلزَّوْجَيْنِ وَالْأُمِّ وَبِنْتِ الْإِبْنِ

وَالْأَخْتِ لِأَبٍ وَقَدْ مَرَّ بِهَا نَهْ وَحُجُبُ حِرْمَانٍ وَالْوَرِثَةُ فِيهِ

فَرِيقَانِ فَرِيقٌ لَا يَحْجُبُونَ بِحَالِ الْبَتَّةِ وَهُمْ سِتَّةُ الْإِبْنِ

وَالْأَبُ وَالزَّوْجُ وَالْبِنْتُ وَالْأُمُّ وَالزَّوْجَةُ وَفَرِيقٌ يَرْتُونَ

بِحَالٍ وَيَحْجُبُونَ بِحَالٍ وَهَذَا مَبْنِيٌّ عَلَى أَصْلَيْنِ أَحَدُ

هُمَا هَوَانٌ كُلُّ مَنْ يَدْلِي إِلَى الْمَيِّتِ بِشَخْصٍ لَا يَرِثُ مَعَ

وَجُودِ ذَلِكَ الشَّخْصِ كَابْنِ الْإِبْنِ مَعَ الْإِبْنِ سِوَى

لَوْلَادِ الْأُمِّ فَإِنَّهُمْ يَرْتُونَ مَعَهَا لِانْعِدَامِ اسْتِحْقَاقِهَا جَمِيعَ

وَأَعْتَقَ مِنْ أَعْتَقَيْنِ أَوْكَأَ تَبْنِ أَوْكَأَ تَبْ مِنْ كَأَ تَبْنِ
 أَوْدَبَرْنَ أَوْدَبَرْنَ مِنْ دَبَرْنَ أَوْجَرَوْلَا مُعْتَقُهُنَّ وَلَوْ تَرَكَ أَبَا
 الْهَيْتِفِ وَأَبْنَهُ سُدُسُ الْوَلَاةِ لِلْأَبِ وَالْبَا قِي لِلْأَبْنِ
 أَعِنْدَ هُمَا كُلُّهُ لِلْأَبْنِ وَلَوْ تَرَكَ ابْنَ الْهَيْتِفِ وَجَدَهُ
 فَالْوَلَاةُ كُلُّهُ لِلْأَبْنِ بِالْإِنْتِقَابِ وَمَنْ مَلَكَ ذَارِجِمَ مُحْرِمَ
 مِنْهُ عَتَقَ عَلَيْهِ وَيَكُونُ وَلَائُهُ لَهُ كَثَلَتْ بَنَاتٍ لِلصَّغْرَى
 عِشْرُونَ دِينَارًا وَلِلْكُبْرَى ثَلَاثُونَ دِينَارًا فَاشْتَرَتَا أَبَا هُمَا
 بِالْخَمْسِينَ ثُمَّ مَاتَ الْأَبُ وَتَرَكَ شَيْئًا مِنَ الْمَالِ فَالْثُلُثَانِ
 بَيْنَهُنَّ ثَلَاثًا بِالْعَرَضِ وَالْبَاقِي بَيْنَ مُشْتَرَتِي الْأَبِ
 أَخْمَا سَا ثَلَاثَةُ أَخْمَاسٍ لِلْكُبْرَى وَخُمْسُهُ لِلصَّغْرَى
 فَتَصَرَّحَ مِنْ خُمْسَةٍ وَأَرْبَعِينَ

الْحُكْمُ فِي أَعْمَامِ الْهَيْتِ ثُمَّ فِي أَعْمَامِ أَبِيهِ ثُمَّ فِي أَعْمَامِ
جَدِّهِ أَمَّا الْعَصْبَةُ بِغَيْرِهِ فَأَرْبَعٌ مِنَ النِّسْوَةِ وَهُنَّ الْأَتِي
فَرُضُهُنَّ النِّصْفُ وَالثَّلَاثَانِ يَصِرْنَ عَصْبَةً بِأَخَوَاتِهِنَّ
كَهَذَا كَرْنَا فِي حَالَاتِهِنَّ وَمَنْ لَا فَرْصَ لَهَا مِنَ الْإِنَاثِ
وَأَخَوَهَا عَصْبَةٌ لِأَنِّي عَصْبَةٌ بِأَخِيهَا كَالْعَمِّ وَالْعَمَّةِ
وَأَمَّا الْعَصْبَةُ مَعَ غَيْرِهِ فَكُلُّ أَنْثَى تَصِيرُ عَصْبَةً مَعَ أَنْثَى
أُخْرَى كَالْأَخْتِ مَعَ ابْنَتِ كَهَذَا كَرْنَا وَآخِرُ الْعَصَبَاتِ
مَوْلَى الْعِتَاقَةِ ثُمَّ عَصْبَتُهُ عَلَى التَّرْتِيبِ الَّذِي ذَكَرْنَا
لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ وَالسَّلَامُ الْوَلَاءُ لِلْحَمَّةِ كُلِّ حَمَّةٍ النَّسَبِ
وَلَا شَيْءَ لِلْإِنَاثِ مِنْ وَرَثَةِ الْهَيْتِ لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ
وَالسَّلَامُ لَيْسَ لِلنِّسَاءِ مِنَ الْوَلَايَةِ شَيْءٌ إِلَّا مَا اعْتَقَنَ

واصله وجرُّ أبيه وجرُّ جدِّه الاقرب فالاقرب يرَّجَحون
 بِقُرْبِ الدَّ رَجَّةٍ اُعْنِي بِهِ اَوْلَاهُمْ بِا لِهِيَاثِ جُرُّ الْهَيْتِ
 اَيُّ الْبَنُوْنَ تَمَّ بَنُوْهُمْ وَاِنْ سَفَلُوْا تَمَّ اَصْلُهُ اَيُّ الْاَبِ تَمَّ الْجَدُّ
 اَبِ الْاَبِ وَاِنْ عَلَا تَمَّ جُرُّ اَبِيْهِ اَيُّ الْاَخُوَّةِ تَمَّ بَنُوْهُمْ
 وَاِنْ سَفَلُوْا تَمَّ جُرُّ جَدِّهِ اَيُّ الْاَعْمَامِ تَمَّ بَنُوْهُمْ وَاِنْ سَفَلُوْا
 تَمَّ يَرَّ جَحُّونَ بِقُوَّةِ الْقَرَابَةِ اُعْنِي بِهِ ذَالِقَرَا بَتَيْنِ اُولِي
 مِنْ ذِي قَرَابَةٍ وَاَحَدَةٍ ذَكَرًا كَانَ اَوْ اُنْثَى لِقَوْلِهِ
 عَلَيْهِ السَّلَامُ اِنَّ اَعْيَانَ بَنِي الْاَبِ وَالْاُمِّ يَتَوَارِثُوْنَ دُونَ
 بَنِي الْعَلَاتِ كَالْاَخِ لِاَبٍ وَاُمِّ اُولِي مِنْ الْاَخِ لِاَبٍ وَالْاُخْتُ
 لِاَبٍ وَاُمِّ اِذَا صَارَتْ عَصَبَةً مَعَ الْبِنْتِ اَوْ لِي مِنْ الْاَخِ لِاَبٍ
 وَاَبْنُ الْاَخِ لِاَبٍ وَاُمِّ اُولِي مِنْ اَبْنِ الْاَخِ لِاَبٍ وَكَذَلِكَ

أم . أم .
 أم . أب . أم .
 أم . أب .

يُقَسَّمُ السُّدُسُ بَيْنَهُمَا عِنْدَ أَبِي يُوسُفَ رَحْمَةُ اللَّهِ عَلَيْهِ

أَنصَابًا يَا عُبَّارَ الْإِبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحْمَةُ اللَّهِ عَلَيْهِ

أَثَلَاثِيًا عُبَّارِ الْجِهَاتِ

بَابُ الْعَصَبَاتِ

الْعَصَبَاتُ النَّسَبِيَّةُ ثَلَاثَةٌ عَصَبَةُ بِنَفْسِهِ وَ عَصَبَةُ بغيرِهِ

وَعَصَبَةُ مَعَ غَيْرِهِ أَمَّا الْعَصَبَةُ بِنَفْسِهِ فَكُلُّ ذَكَرٍ لَا يَدُ خُلٍ

فِي نَسَبِهِ إِلَى الْهَيْتِ أَتَنِي وَهِيَ أَرْبَعَةُ أَصْنَافٍ جِزُّ الْهَيْتِ

وابوين اوزوجة وابوين ولوكان مكان الأب جد فلام
 ثلث جميع الهال إلا عند أبي يوسف رحمه الله فإن لها
 ايضاً ثلث الباقي ولجدة السدس ليم كانت اولاد
 واحدة كانت اواكثر اذا كن ثابتات متحاضيات
 في الدرجة ويسقطن كلت بالأم والأبويات ايضاً
 بالأب وكذلك بالجد الأم الأب وإن علت فإنها ترث
 مع الجد لأنها ليست من قبله والجدة القربي من أي
 جهة كانت تحجب الجدة البعدي من أي جهة
 كانت و امرئة كانت القربي او محجوبة واذا كانت
 الجدة ذات قرانة واحدة كلام الأب والأخري ذات
 قرأتين أو أكثر كلام الأم وهي ايضاً أم أب الأب
 بهذه الصورة

لَابٍ وَأُمٍّ وَلَهُنَّ السُّدُسُ مَعَ الْأَخْتِ لَابٍ وَأُمٍّ تَكْبِلَةً
لِلثَّلَاثِينَ وَلَا يَرِثُنَّ مَعَ الْأَخْتَيْنِ لَابٍ وَأُمٍّ إِلَّا أَنْ يَكُونُ
مَعَهُنَّ أَخٌ لَابٍ فَيُعْصِبَهُنَّ وَيَكُونُ الْبَاقِي بَيْنَهُنَّ لِلذَّكَرِ
مِثْلَ حَظِّ الْأُنثَيَيْنِ وَالسَّادِسَةُ أَنْ يَصْرُنَّ عَصَبَةً مَعَ الْبَنَاتِ
أَوْ مَعَ بَنَاتِ الْإِبْنِ لَهَا ذَكَرُ نَا وَبَنُو الْأَعْيَانِ وَبَنُو الْعَلَاتِ
كُلُّهُمْ يَسْقُطُونَ بِالْإِبْنِ وَابْنِ الْإِبْنِ وَإِنْ سَقَلَ وَبِالْأَبِ
بِالْإِتِّفَاقِ وَبِالْجِدِّ عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى
وَيَسْقُطُ بَنُو الْعَلَاتِ أَيْضًا بِالْأَخِ لَابٍ وَأُمٍّ أَمَّا لِلْكُمِّ فَأَحْوَالُ
ثَلَاثُ السُّدُسِ مَعَ الْوَلَدِ أَوْ وَلَدِ الْإِبْنِ وَإِنْ سَقَلَ أَوْ مَعَ الْإِ
ثْنَيْنِ مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ فَصَاعِدًا مِنْ أَيِّ جِهَةٍ كُنَّا
وَلِثَلَاثِ الْكُلِّ عِنْدَ عَدِمٍ هَوْلًا الْهَذُورَيْنِ وَثَلَاثُ مَا بَقِيَ
بَعْدَ فَرْصِ أَحَدِ الزَّوْجَيْنِ وَذَلِكَ فِي مَسْنَلَتَيْنِ نَوْجٍ

الْوَلِ النَّصْفَ وَلِلْوَسْطِيِّ مِنَ الْغَرِيفِ الْكَوْلُ مَعَ
 مَنْ يُوَازِيهَا السُّدُسُ تَكْمِلَةُ الثَّلَاثِينَ وَ لَا شَيْءٌ
 لِلْسُّفْلِيَّاتِ أَصْلًا إِلَّا أَنْ يَكُونَ مَعَهُنَّ غُلَامٌ فَيُعْصِبُهُنَّ
 مَنْ كَانَتْ بِحَدَايِهِ وَمَنْ كَانَتْ فَوْقَهُ لِهِنَّ لَمْ يَكُنْ
 دَاتٌ سَهْمٌ وَيَسْقُطُ مِنْ دُونِهِ وَأَمَّا الْأَخَوَاتُ لِأَبٍ وَلِأُمٍّ
 فَأَحْوَالُ خُبْسِ النَّصْفِ لِلْوَاحِدَةِ وَالثَّلَاثَانِ لِلْثَّانِيَيْنِ
 فَصَاعِدًا وَمَعَ الْأَخِ لِأَبٍ وَأُمٍّ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ
 فَيُضْرَبُ بِهِ عَصَبَةٌ لِيَسْتَوِيَ فِيهِمْ فِي الْقَرَابَةِ إِلَى الْهِيتِ
 وَلَهُنَّ الْبَاقِي مَعَ الْبَنَاتِ أَوْ بَنَاتِ الْإِبْنِ لِقَوْلِهِ عَلَيْهِ الصَّلَاةُ
 وَالسَّلَامُ اجْعَلُوا الْأَخَوَاتِ مَعَ الْبَنَاتِ عَصَبَةٌ وَالْأَخَوَاتُ
 لِأَبٍ كَالْأَخَوَاتِ لِأُمٍّ وَلَهُنَّ أَحْوَالُ سَبْعِ النَّصْفِ
 لِلْوَاحِدَةِ وَالثَّلَاثَانِ لِلْثَّانِيَيْنِ فَصَاعِدًا عِنْدَ عَدَمِ الْأَخَوَاتِ

ابْنُ بِنْتٍ ابْنٌ ابْنٌ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ ابْنٌ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ ابْنُ بِنْتٍ

ابْنُ بِنْتٍ ابْنُ بِنْتٍ

ابْنُ بِنْتٍ

الْعُلْيَا مِنَ الْغَرِيفِ الْأَوَّلِ لِأَيَّوَارِهَا أَحَدٌ وَالْوُسْطَى

مِنَ الْغَرِيفِ الْأَوَّلِ تُوَارِيهَا الْعُلْيَا مِنَ الْغَرِيفِ الثَّانِي

وَالسُّفْلَى مِنَ الْغَرِيفِ الْأَوَّلِ تُوَارِيهَا الْوُسْطَى

مِنَ الْغَرِيفِ الثَّانِي وَالْعُلْيَا مِنَ الْغَرِيفِ الثَّلَاثِ

وَالسُّفْلَى مِنَ الْغَرِيفِ الثَّانِي تُوَارِيهَا الْوُسْطَى

مِنَ الْغَرِيفِ الثَّلَاثِ وَالسُّفْلَى مِنَ الْغَرِيفِ الثَّلَاثِ

لِأَيَّوَارِهَا أَحَدٌ إِذَا عَرَفْتَ هَذَا فَقُولِ لِلْعُلْيَا مِنَ الْغَرِيفِ

كَبَنَاتِ الصَّلْبِ وَلَهُنَّ أَحْوَالٌ سِتُّ النِّصْفِ لِلْوَا حِدَةٍ
وَالثَّلَاثَانِ لِلْاِثْنَيْنِ فَمَا عِدَا عِنْدَ عَدَمِ بَنَاتِ الصَّلْبِ
وَلَهُنَّ السُّدُسُ مَعَ الْوَاحِدَةِ الصَّلْبِيَّةِ تَكْمِلَةً لِلثَّلَاثَيْنِ
وَلَا يَرْتَضْنَ مَعَ الصَّلْبِيَّتَيْنِ إِلَّا أَنْ يَكُونَ بِحِذَائِهِنَّ أَوْ اسْفَلَ
مِنْهُنَّ غُلَامٌ فَيُعَصِّبُهُنَّ وَالْبَا فِي بَيْنَهُنَّ لِلَّذِي كَرُمَتْهُ
حِطَا لْاِثْنَيْنِ وَيَسْقُطْنَ كُلُّهُنَّ بِالْأَبْنِ وَلَوْ تَرَكَ ثَلَاثَ
بَنَاتِ ابْنٍ بَعْضُهُنَّ أَسْفَلَ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنٍ
ابْنِ آخَرَ بَعْضُهُنَّ أَسْفَلَ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنٍ
ابْنِ ابْنٍ آخَرَ بَعْضُهُنَّ أَسْفَلَ مِنْ بَعْضٍ بِهَذِهِ الصُّورَةُ
وَتُسَمَّى مَسْئَلَةُ التَّشْبِيهِ

من
الْفَرِيقِ الْأَوَّلِ وَالْفَرِيقِ الثَّانِي وَالْفَرِيقِ الثَّلَاثِ
ابْنُ ابْنُ ابْنُ

فَأَحْوَالُ ثَلَاثِ السُّدُسِ لِلْوَحِيدِ الثَّلَاثِ لِلْإِثْنَيْنِ فَصَاعِدًا
 ذَكَرَهُمْ إِنْهُمْ فِي الْقِسْمَةِ وَالْإِسْتِحْقَاقِ سَوَاءٌ
 وَيَسْقُطُونَ بِالْوَلَدِ وَلِدِ الْإِبْنِ وَإِنْ سَقَلَ وَبِالْأَبِ
 وَبِالْجَدِّ بِالْإِثْنَيْنِ وَآمَّا لِلزَّوْجِ فَحَا لَتَانِ النِّصْفِ
 عِنْدَ عَدَمِ الْوَلَدِ وَوَلَدِ الْإِبْنِ وَإِنْ سَقَلَ وَالرُّبْعُ
 مَعَ الْوَلَدِ أَوْ وَلَدِ ابْنٍ وَإِنْ سَقَلَ

فَصَلِّ فِي النِّسَاءِ

لِلزَّوْجَاتِ حَالَتَانِ الرَّبْعُ لِلْوَحِيدَةِ فَصَاعِدًا عِنْدَ عَدَمِ
 الْوَلَدِ وَلَدِ الْإِبْنِ وَإِنْ سَقَلَ وَالثُّنَيْنِ مَعَ الْوَلَدِ
 أَوْ وَلَدِ الْإِبْنِ وَإِنْ سَقَلَ وَأُمَّالِبَنَاتِ الصُّلْبِ فَأَحْوَالُ ثَلَاثِ
 النِّصْفِ لِلْوَحِيدَةِ وَالثَّلَاثَانِ لِلْإِثْنَيْنِ فَصَاعِدًا أَوْ مَعَ الْإِبْنِ
 لِلذَّكَرِ مِثْلُ حَطِّ الْإِثْنَيْنِ وَهُوَ يَعْصِبُهُنَّ وَبَنَاتِ الْإِبْنِ

نفرًا أربعة من الرجال وهم الأب والجدا لصحيح
 وإن علا والأخ للأم والزوج وثمان من النساء وهن الزوجة
 والبنت وبنت الابن وإن سفلت والأخت لأب وأم
 والأخت لأب والأخت للأم والجدة الصحيحة
 وهي التي لا يدخل في نسبتها إلى الهيت جد فاسد
 أمالاً ب فاحوال ثلث الغرض المطلق وهو السدس
 وذلك مع الابن أو ابن الابن وإن سفل والغرض
 والتعصيب معاً وذلك مع الابنة أو ابنة الابن وإن سفلت
 والتعصيب المحض وذلك عند عدم الولد وولد الابن
 وإن سفل والجدا لصحيح كالأب إلا في أربع مسائل
 وسند كرها إنشاء الله تعالى ويسقط الجدا بالأب
 لأن الأب أصل في قرابة الجد إلى الهيت وأما الولد الأم

مَصْرًا عَلَيَّ اقْرَارِهِ ثُمَّ الْهُوسَى لَهُ بِجَمِيعِ الْهَالِ ثُمَّ بَيْتُ الْهَالِ
فَصُلِّ فِي الْهَوَانِ مِنَ الْإِرْثِ

الْمَانِعُ مِنَ الْإِرْثِ أَرْبَعَةُ الرِّقَّةِ وَأَفْرَاكَانَ أَوْنَاتَا وَالْقَتْلُ
الَّذِي يَتَعَلَّقُ بِهِ وَجُوبُ الْقِصَاصِ أَوْ الْكُفَّارَةِ وَاخْتِلَافُ
الدِّينَيْنِ وَاخْتِلَافُ الدَّارَيْنِ إِمَّا حَقِيقَةً كَالْحَرْبِ
وَالذِّمِّ أَوْ حُكْمًا كَالْهَسْتَا مِنَ وَالِدِ مَيِّ أَوْ الْحَرْبِ بَيْنَ
مِنْ دَارَيْنِ مُخْتَلِفَيْنِ وَالِدٌ أَرَاهَا تَخْتَلِفُ
بِاخْتِلَافِ الْمَنْعَةِ وَالْهَلِكِ لِانْقِطَاعِ الْعِصَةِ فِيمَا بَيْنَهُمْ
بَابُ مَعْرِفَةِ الْفُرُوضِ وَمُسْتَحَقِّهَا

الْفُرُوضُ الْمَقْدَرَةُ فِي كِتَابِ اللَّهِ تَعَالَى سِتَّةُ النِّصْفِ
وَالرُّبْعِ وَالثُّلُثِ وَالثُّلُثَانِ وَالثَّلْثُ وَالسُّدُسُ عَلَيَّ
التَّضْعِيفِ وَالتَّنْصِيفِ وَأَصْحَابُ هَذِهِ السِّهْمِ اثْنَيْ عَشَرَ

وَتَكْفِينِهِ بِالْإِتْبَانِ وَلَا تَقْتِيرُ ثُمَّ يَقْضِي دِيُونَهُ مِنْ
جَمِيعِ مَا بَقِيَ مِنْ مَالِهِ ثُمَّ تَنْفِذُ وَصَايَاهُ مِنْ ثُلُثِ
مَا بَقِيَ بَعْدَ الدِّينِ ثُمَّ يُقَسِّمُ الْبَاقِيَ بَيْنَ وَرَثَتِهِ
بِالْكِتَابِ وَالسُّنَّةِ وَاجْتِمَاعِ الْأُمَّةِ فَيُبدَأُ بِأَصْحَابِ
الْفَرَائِضِ وَهُمْ الَّذِينَ لَهُمْ سَهَامٌ مُقَدَّرَةٌ فِي كِتَابِ
اللَّهِ تَعَالَى ثُمَّ بِالْعَصَبَاتِ مِنْ جِهَةِ النَّسَبِ وَالْعَصَبَةُ
كُلُّ مَنْ يَأْخُذُ مِنَ التَّرِكَةِ مَا أَبَقَتْهُ أَصْحَابُ الْفَرَائِضِ
وَعِنْدَ الْإِنْفِرَادِ يَحْرُزُ جَمِيعُ الْأَهْلِ ثُمَّ بِالْعَصَبَةِ مِنْ
جِهَةِ السَّبَبِ وَهُوَ مَوْلَى الْعِتَاقَةِ ثُمَّ عَصَبَتُهُ ثُمَّ الرَّدُّ
عَلَى ذَوِي الْفُرُوضِ النَّسَبِيَّةِ بِقَدْرِ حَقِّهِمْ ثُمَّ ذَوِي
الْأَرْحَامِ ثُمَّ مَوْلَى الْبَوَالَاةِ ثُمَّ الْهَقْرُ لَهُ بِالنَّسَبِ عَلَى الْغَيْرِ
بِحَيْثُ لَمْ يَثْبُتْ نَسَبُهُ مِنْ ذَلِكَ الْغَيْرِ إِذَا مَاتَ الْهَقْرُ

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

الْحَمْدُ لِلَّهِ رَبِّ الْعَالَمِينَ حَمْدَ الشَّاكِرِينَ وَالصَّلَاةُ
عَلَى خَيْرِ الْبَرِيَّةِ مُحَمَّدٍ وَآلِهِ الطَّيِّبِينَ قَالَ رَسُولُ اللَّهِ
صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ تَعْلَمُوا الْفَرَايِضَ وَعَلِمُوهَا النَّاسَ
فَإِنَّهَا نِصْفُ الْعِلْمِ قَالَ عَلِمَاؤُنَا رَحِمَهُمُ اللَّهُ يَتَعَلَّقُ

بِتَرْكَةِ الْبَيْتِ حَقُوقَ أَرْبَعَةِ مَرْتَبَةِ الْأَوَّلِ يَدُهُ بِتَجْهِيْزِهِ

AN

ESSAY

ON

THE LAW OF BAILMENTS.

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptis-venditis, *conductis-lo-*
catis, quibus vitæ societas continetur, magni est judicis statuere (præsertim
cùm in plerisque sint judicia contraria), *quid quemque cuique præstare*
oporteat.

Q. SÆVOLA, apud CIC. de Offic. lib. III.

AN

ESSAY

ON

THE LAW OF BAILMENTS.

HAVING lately had occasion to examine with some attention the nature and properties of that contract, which lawyers call BAILMENT, or, *A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered*, I could not but observe with surprise, that a title in our ENGLISH law, which seems the most generally interesting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life, without knowing, or caring to know, any of the numberless niceties, which attend our abstruse, though elegant, system of real property, and without being at all acquainted with that exquisite logick, on

which our rules of special pleading are founded; but there is hardly a man of any age or station, who does not every week and almost every day contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depository* or a person *depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more absurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights of which we have no just idea? Nor must it ever be forgotten, that the contracts above-mentioned are among the principal springs and wheels of civil society, that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems therefore astonishing, that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of ELIZABETH to the reign of ANNE, the doctrine of *bailments* should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any

other part, perhaps, of juridical learning; at least, than any other part equally simple.

Such being the case, I could not help imagining, that a short and perspicuous discussion of this title, an exposition of all our ancient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of *English* law; especially as our excellent BLACKSTONE, who of all men was best able to throw the clearest light on this, as on every other, subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for he represents *lending and letting to hire*, which are *bailments* by his own definition, as contracts of *a distinct species*; he says nothing of employment by *commission*; he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words*. His commentaries are

* 2. Comm. 452, 453, 454.

the most correct and beautiful outline, that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, *Englishmen* might hope at length to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work, which every lover of humanity and peace must anxiously wish to see accomplished. The following essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary, in the Commentaries on the Laws of ENGLAND.

I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed *historically*, to show with what perfect harmony those principles are recognised and established by other nations, especially the ROMANS, as well as by our ENGLISH courts, when their decisions are properly understood and clearly distinguished; after which I shall resume *synthetically* the whole learning of *bailments*, and expound such rules, as, in my humble appre-

hension, will prevent any farther perplexity on this interesting title, except in cases very peculiarly circumstanced.

From the obligation, contained in the definition of bailment, *to restore the thing bailed at a certain time*, it follows, that the bailee must *keep* it, and be *responsible* to the bailor, *if it be lost or damaged*; but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment*; and the investigation of this *degree* in every particular contract is the problem, which involves the principal difficulty.

There are infinite shades of *care* or *diligence* from the slightest momentary thought, or transient glance of attention, to the most vigilant anxiety and solicitude; but *extremes* in this case, as in most others, *are inapplicable to practice*: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man, who borrows a book or a seal. The degrees then of care, for which we are seeking, must lie somewhere between these extremes

and, by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive, that *the generality of rational men* use nearly the same degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own* concerns, is a proper measure of that, which would uniformly be required in performing every contract, if there were not strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here then we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care, which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that

attention, which a man *remarkably exact and thoughtful* gives to the securing of his personal property.

The fixed mode or standard of diligence I shall (for want of an apter epithet) invariably call ORDINARY; although that word is equivocal, and sometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent the least obscurity. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called LESS, and the second, MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abstract morality; but in practice and actual life they are commonly false: they are often, indeed, used for mere *intensives*, as *the MOST diligent* for *VERY diligent*; but this is a rhetorical figure; and, as rhetorick, like her sister poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth: for this reason I would reject from the present inquiry all such expressions as *the utmost care, all possible, or all imaginable, diligence*, and the like, which have been the cause of many errors in the code of ancient ROME, whence, as it will soon be demonstrated,

they have been introduced into our books even of high authority.

Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus the omission of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series of variable modes of default infinitely diminishing, in proportion as their opposite modes of care infinitely increase; for the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault, that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust and a deviation from common honesty. This known, or fixed, point of negligence is therefore a mean between *fraud* and *accident*; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms be-

ing, as before, excluded, we must look within them for modes applicable to practice; and these we shall find to be the omissions of such care as *a man of common sense, however inattentive*, and of such as a *very cautious, and vigilant* man, respectively take of *their own possessions*.

The constant, or fixed, mode of *default* I likewise call ORDINARY, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes the first may be called GREATER, and the second, LESS, THAN ORDINARY, or the first GROSS, and the other, SLIGHT neglect.

It is obvious, that a bailee of common honesty, if he also have common prudence, would not be *more negligent than ordinary* in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of *fraud* may be conceived increasing in a series from the term where *gross neglect* ends, to a term, where positive *crime* begins; as *crimes* likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of *accident* from the limit of extremely slight ne-

glec̄t to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities; but it does not follow, that *neglect*, *deceit*, and *accident*, are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence*, which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

When the contract is *reciprocally beneficial to both parties*, the obligation hangs in an even balance; and there can be no reason to recede from the standard: nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect*; but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the *bailee*, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than

good faith were exacted from such a person, that is. if he were to be made answerable for less than *gross* neglect, few men after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reasonable, that he, *who receives the benefit, should bear the burden*, but, if he were not obliged to be *more than ordinarily* careful, and bound to answer even for *slight* neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.

This distinction is conformable not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit may, by a special undertaking, make himself liable for *ordinary*, or *slight*, neglect, or even for inevitable *accident*: hence, as an agreement, *that a man may safely be dishonest*, is repugnant to decency and morality, and, as no

man shall be *presumed* to bind himself against *irresistible force*, it is a just rule, that *every* bailee is responsible for *fraud*, even *though* the contrary be stipulated, but that *no* bailee is responsible for *accident*, *unless* it be most expressly so agreed.

The plain elements of natural law, on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or *historical*, part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.

Of all known laws the most ancient and venerable are those of the JEWS; and among the *Mosaick* institutions we have some curious rules on the very subject before us; but, as they are not numerous enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places: for a similar reason, I shall say nothing here of the *Attick* laws on this title, but shall proceed at once to that nation, by which the wisdom of ATHENS was eclipsed, and her glory extinguished.

The decisions of the old *Roman* lawyers, collected and arranged in the sixth century by the order of JUSTINIAN, have been for ages, and in

some degree still are, in bad odour among *Englishmen*: this is an honest prejudice, and flows from a laudable source; but a prejudice, most certainly, it is, and, like all others, may be carried to a culpable excess.

The constitution of ROME was originally excellent; but, when it was *settled*, as historians write, by AUGUSTUS, or, in truer words, when that base dissembler and cold-blooded assassin C. *Octavius* gave law to millions of honest, wiser, and braver men than himself by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the state both executive and legislative, was a tyrannous ordinance, with the name only, not the nature, of a law*; had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *sons* of those who consented to it; for “a renunciation of *personal* rights, especially rights of the highest nature, can have no operation beyond the *persons* of those, who renounce them.” Yet, iniquitous and odious as the *settlement* of the constitution was, ULPIAN only spoke in conformity to it, when he said that “the will of the prince had the force

* D. I. 4. 1.

“ of law ;” that is, as he afterwards explains himself, *in the ROMAN empire*; for he neither meant, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early NORMAN kings, that some of them, according to Sir JOHN FORTESCUE, “ were not pleased with their own laws, but exerted themselves to introduce the civil laws of *Rome* into the government of ENGLAND* ;” and so hateful was it to our sturdy ancestors, that, if JOHN of SALISBURY be credited, “ they burned and tore all such books of civil and canon law as fell into their hands† :” but this was intemperate zeal; and it would have been sufficient to improbate the *publick*, or *constitutional*, maxims of the *Roman* imperial law, as absurd in themselves as well as inapplicable to our free government, without rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the *Romans* are demonstrated by FORTESCUE, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of SEVERUS or CARACALLA, which were laws, it seems, at *Rome*,

* *Dr. Laud. Leg. Angl. c. 33. 34.* † *Seld. in Fort. c. 33.*

have certainly no kind of authority at *Westminster*; but, in questions of *rational* law, no cause can be assigned, why we should not shorten our own labour by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense, in one age, must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all instances, to reconcile NERVA with PROCULUS, LABEO with JULIAN, and GAIUS either with CELSUS or with himself, I shall proceed to exhibit a summary of the *Roman* law on the subject of *responsibility for neglect*.

The two great sources, whence all the decisions of civilians in this matter must be derived, are *two* laws of ULPIAN; the first of which is taken from his work on *Sabinus*, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

“Some contracts, says the great writer on *Sabinus*,

“ make the party responsible for DECEIT ONLY;
 “ some, for both DECEIT AND NEGLECT. No-
 “ thing more than *responsibility for DECEIT is*
 “ *demande*d in DEPOSITS and POSSESSION AT
 “ WILL; both DECEIT AND NEGLECT are in-
 “ *hibited* in COMMISSIONS, LENDING FOR
 “ USE, CUSTODY AFTER SALE, TAKING IN
 “ PLEDGE, HIRING; also in PORTIONS, GUAR-
 “ DIANSHIPS, VOLUNTARY WORK: (among
 “ these some *require even more than ordinary*
 “ DILIGENCE). PARTNERSHIP and UNDI-
 “ VIDED PROPERTY make *the partner and joint-*
 “ *proprietor* answerable for both DECEIT AND
 “ NEGLIGENCE*.”

“ In contracts, says the same author in his
 “ other work, we are sometimes responsible for
 “ DECEIT ALONE; sometimes, for NEGLECT
 “ ALSO; for DECEIT ONLY in DEPOSITS; be-
 “ cause, since NO BENEFIT accrues to the de-
 “ positary, he can justly be answerable for no
 “ more than DECEIT; but, if a REWARD hap-
 “ pen to be given, then *a responsibility for NE-*
 “ GLECT ALSO is required; or, if it be agreed

* Contractus quidam DOLUM malum DUNTAXAT recipiunt;
 quidam, et DOLUM ET CULPAM. DOLUM tantum DEPOSITUM
 et PRECARIUM; DOLUM ET CULPAM, MANDATUM, COMMO-
 DATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM; item
 DOTIS DATIO, TUTELA, NEGOTIA GESTA: (in his QUIDAM et
 DILIGENTIAM). SOCIETAS et RERUM COMMUNIO et DOLUM
 ET CULPAM recipit. D. 50. 17. 23.

“ at the time of the contract, that the depositary
 “ shall answer both for NEGLECT and for ACCI-
 “ DENT: but, where A BENEFIT accrues to
 “ BOTH parties, as in KEEPING A THING
 “ SOLD, as in HIRING, as in PORTIONS, as in
 “ PLEDGES, as in PARTNERSHIP, both DE-
 “ CEIT AND NEGLECT make the party liable.
 “ LENDING FOR USE, indeed, is for the most
 “ part BENEFICIAL to the BORROWER ONLY;
 “ and, for this reason, the better opinion is that
 “ of Q. MUCIUS, who thought, that HE should
 “ be responsible not only for NEGLECT, but
 “ even for the omission of *more than ordinary*
 “ DILIGENCE*.”

One would scarce have believed it possible,
 that there could have been two opinions on laws
 so perspicuous and precise, composed by the same
 writer, who was indubitably the best expositor

* In contractibus interdum DOLUM SOLUM, interdum ET
 CULPAM, præstamus; DOLUM in DEPOSITO; nam, quia
 NULLA UTILITAS ejus versatur, apud quem deponitur, me-
 rito DOLUS præstatur SOLUS; nisi sortè et MERCES accessit,
 tunc enim, ut est et constitutum, ETIAM CULPA exhibetur;
 aut, si hoc ab initio convenit, ut et CULPAM et PERICULUM
 præstet is, penes quem deponitur: sed, ubi UTRIUSQUE UTI-
 LITAS vertitur, ut in EMPTO, ut in LOCATO, ut in DOTE, ut
 in PIGNORE, ut in SOCIETATE, et DOLUS ET CULPA præstatur.
 COMMODATUM autem plerumque SOLAM UTILITATEM con-
 tinet ejus, cui COMMODATUR; et ideo verior est Q. MUCII
 sententia existimantis et CULPAM præstandam et DILIGEN-
 TIAM. D. 13. 6. 5. 2.

of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in *Latin**, one or two in *Greek*†, and some in the *modern* languages of EUROPE, besides the general expositions of that important part of the digest, in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themselves clear, than of elucidating passages, which have any obscurity in the words or the sense of them. CAMPANAS, indeed, who was both a lawyer and a poet, has turned the first law of *Ulpian* into *Latin* hexameters; and his authority, both in prose and verse, confirms the interpretation, which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old *Roman* lawyers, even the most

* BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GIPHANIUS, J. GODEFROI, and others.

† The scholium on *Harmenopolus*, l. 6. tit. de Reg. Jur. n. 15. may be considered as a commentary on this law.

eminent, have written on the subject; secondly, the loose and equivocal sense of the words *DILIGENTIA* and *CULPA*; lastly and principally, the darkness of the parenthetical clause *IN HIS QUIDAM ET DILIGENTIAM*, which has produced more doubt, as to its true reading and signification, than any sentence of equal length in any author *Greek* or *Latin*. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

The vulgate editions of the pandects, and the manuscripts, from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by *CUJAS*, *P. FABER*, *LE CONTE*, *DONELLUS*, and *most* others, as giving a sense both perspicuous in itself and consistent with the second law; but the *FLORENTINE* copy has *quidem*, and the copies, from which the *Basilica* were translated three centuries after *JUSTINIAN*, appear to have contained the same word, since the *Greeks* have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of *ULPIAN*; for, if it be agreed, that *diligentia* means, by a figure of speech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the second law before cited, that “ *SOME* of the pre-

“ceding contracts demand that higher degree;” but the *Florentine* reading will denote, in contradiction to it, that “ALL of them require more “than ordinary exertions.”

It is by no means my design to depreciate the authority of the venerable manuscript preserved at *Florence*; for, although few civilians, I believe, agree with POLITIAN, in supposing it to be one of the *originals*, which were sent by *Justinian* himself to the principal towns of *Italy**, yet it may *possibly* be the very book, which the Emperor *LOTHARIUS II.* is *said* to have found at *Amalfi* about the year 1130, and gave to the citizens of *Prsa*, from whom it was taken, near three hundred years after, by the *Florentines*, and has been kept by them with superstitious reverence†: be that as it may, the copy deserves the highest respect; but, if any proof be requisite, that it is *no faultless* transcript, we may observe, that, in the very law before us, *accedunt* is erroneously written for *accidunt*; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the *Greek* interpreters, and conveys a meaning, as *BOCERUS* and others have remarked, not supportable by any principle or analogy.

* Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

† Taurelli, Præf. ad Pand. Florent.

This, too, is indisputably clear; that the sentence *in his QUIDEM et diligentiam*, is ungrammatical, and cannot be construed according to the interpretation, which some contend for. What verb is understood? *Recipiunt*. What noun? *Contractus*. What then becomes of the words *in his*, namely *contractibus*, unless *in* signify *among*? And, in that case, the difference between *QUIDEM* and *QUIDAM* vanishes; for the clause may still import, that “AMONG the preceding contracts (that is, *in some of them*), more than usual diligence is exacted:” in this sense the *Greek* preposition seems to have been taken by the scholiast on *HARMENOPULUS*; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies, as the *Greeks* have rendered it; but *ACCURSIUS*, *DEL-RIO*, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts, which *ULPIAN* enumerates. We may add, that one or two interpreters thus explain the whole sentence, “in his *contractibus* *quidam jurisconsulti et diligentiam requirunt*,” but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply, that *Ulpian* was of a different opinion. As to the last conjecture, that only *certain cases and circumstances* are meant by the word *QUIDAM*, it scarce de-

serves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as *Taurelli* himself admits, a *Greek*.—Whatever, in short, be the genuine words of this much-controverted clause, I am persuaded, that it ought by no means to be strained into an inconsistency with the *second* law; and this has been the opinion of *most* foreign jurists from Azo and ALCIAT down to HEINECCIUS and HUBER; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.

The law then on this head, which prevailed in the ancient *Roman* empire, and still prevails in *Germany*, *Spain*, *France*, *Italy*, *Holland*, constituting, as it were, a part of the law of nations, is in substance what follows.

Gross neglect, *lata culpa*, or, as the *Roman* lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to DOLUS, or FRAUD, itself; and consists, according to the best interpreters, in the *omission* of that care,

which even inattentive and thoughtless men never fail to take of their own property: this fault they justly hold a violation of good faith.

Ordinary neglect, *levis culpa*, is the *want* of that diligence, which the *generality of mankind use in their own concerns*; that is, of *ordinary care*.

Slight neglect, *levissima culpa*, is the *omission* of that care, which *very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence*.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either *express* or *implied*, civilians establish *three* principles, which they deduce from the law of *Ulpian* on the *Edict*; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus**; as many poems and histories in ancient languages are denominated from their *initial* words.

First: In contracts, which are beneficial *solely* to the owner of the property holden by another,

* Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Instead of *ff*, which is a barbarous corruption of the initial letter of *πρωτεύειν*, many write *D*, for *Digest*, with more clearness and propriety.

no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them, MANDATES, and the *implied* contract *negotiorum gestorum*, a certain care is requisite from *the nature of the thing*; and, as *good faith* itself demands, that such care be proportioned to the exigence of each particular case, the law *presumes*, that the mandatary or commissioner, and, by parity of reason, the *negotiarum gestor*, engaged at the time of contracting to use a degree of diligence *adequate to the performance of the work undertaken**

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in those of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, such care is exacted, as *every prudent man commonly takes of his own goods*; and, by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are answerable for *ordinary* neglect.

Thirdly: In contracts, from which a benefit accrues *only* to him, who has the goods in his

* *Spondet diligentiam*, say the Roman lawyers, *gerendo negotio parem*.

oustody, as in that of LENDING FOR USE, an extraordinary degree of care is demanded; and the *borrower* is, therefore, responsible for *slight* negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of *Roman* law; and it is very remarkable, that even ANTOINE FAVRE, or *Faber*, who was famed for innovation and paradox, who published two ample volumes *De Erroribus Interpretum*, and whom GRAVINA justly calls *the boldest of expositors and the keenest adversary of the practisers**, discovered no error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger GODEFROI of *Geneva*, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient *Romans*, and endeavours to support a new system of his own.

He adopts, in the first place, the *Florentine* reading, of which the student, I hope, has

* Orig. Jur. Civ. lib. i. § 183.

formed by this time a decided opinion from a preceding page of this essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and support of MODESTINUS, of PAULUS, of AFRICANUS, of GAIUS, and of the great PAPINIAN himself; nor does he satisfactorily prove the *fallaciousness*, to which he objects, unless every rule be fallacious, to which there are some exceptions. He understands by DILIGENTIA that care, which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the disputed clause: in the *two*, which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above stated, and uses the common epithets *levis* and *levissima*; but, in order to reconcile his system with many laws, which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend, that ULPIAN himself *must have changed his mind*.

Since his work was not published, I believe, in his life-time, there may be reason to suspect, that he had not completely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head to that most

dangerous and most tremendous power, *the discretion of the judge**.

The *triple* division of neglects had also been highly censured by some lawyers of reputation. ZASIUS had very justly remarked, that neglects differed in *degree*, but not in *species*; adding, “that he had no objection to use the words “*levis* and *levissima*, merely as terms of practice “adopted in courts, for the more easy distinction “between the different degrees of care ex- “acted in the performance of different con- “tracts†:” but DONELLUS, in opposition to his master *Duaren*, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism‡; the minor proposition of which is raised on the figurative and inaccurate manner, in which positives are often used for superlatives, and conversely, even by the best of the old *Roman* lawyers. True it is, that, in the law *Contractus*, the division appears to be

* “Ego certè hac in re censentibus accedo, vix quidquam “generalitèr definiri posse; remque hanc ad *arbitrium judicis*, “prout res est, referendam.” p. 141.

† *Zas. Singul. Resp.* lib. i. cap. 2.

‡ “Quorum definitiones eædem sunt, ea inter se sunt “eædem; *levis* autem culpæ et *levissimæ* una et eadem defi- “nitio est; utraque igitur culpa eadem.” *Comm. Jur. Civ.* lib. xvi. cap. 7.

two-fold only, *DOLUS* and *CULPA*; which differ in *species*, when the first means *actual fraud and malice*, but in *degree* merely, when it denotes no more than *gross neglect*; and, in either case, the second branch, being capable of *more and less*, may be subdivided into *ordinary* and *slight*; a subdivision, which the law *Si ut certo* obviously requires: and thus are both laws perfectly reconciled.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence*; for, when *good faith* is considered as implying at least the exertion of *slight* attention, the other branch, *Care*, is subdivisible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already established both by the analysis and by authority.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the parliament of PARIS, who may, probably, be now living, and, possibly, in that professional station, to which his learning and acuteness justly entitle him. I speak of M. LE BRUN, who published, not many years ago, *an Essay on Responsibility for Neglect**, which he

* *Essai sur la Prestation des Fautes*, à Paris, chez Saugrain, 1764.

had nearly finished, before he had seen the commentary of *Godefroï*, and, in all probability, without ever being acquainted with the opinion of *Donellus*.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges *Godefroï* with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidam et diligentiam*; and that with an air of triumph; insinuating, that *quidam* was only an artful conjecture of *Cujas* and *Le Conte*, for the purpose of establishing *their* system; and he supports *his own* reading by the authority of the *BASILICA*; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting negligence* in any contract, and urges, that such *permission*, as he calls it, is against express law: “now,” says he, where a contract is beneficial to both parties, the doctors permit *slight* negligence, which, how slight soever, is still *negligence*, and ought always to be inhibited.” He warmly contends, that the *ROMAN* laws, properly understood, admit only *two* degrees of diligence; one, measured by that, which a *provident and attentive father of a family* uses in his own concerns; another, by that care, which

the *individual party*, of whom it is required, is *accustomed to take of his own possessions*; and he, very ingeniously, substitutes a new rule in the place of that, which he rejects; namely, that, *when the things in question are the SOLE property of the person, to whom they must be restored*, the holder of them is obliged to keep them with the *first* degree of diligence; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect; that a vendor, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man, who undertakes to manage the affairs of another, either *without* his request, as a *negotiorum gestor*, or *with* it, as a *mandatary*: “but, says he, *when the things are the JOINT property of the parties contracting*, no higher diligence can be required than the second degree, or that, which the *acting party* commonly uses in *his own* affairs; and it is sufficient, *if he keep them, as he keeps his own.*” This he conceives to be the distinction between the *eight* contracts, which precede, and the *two*, which follow, the words in *his quidem et diligentiam*.

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was composing some of his admirable *treatises* on all the different species of express, or implied, *contracts*; and here I seize with pleasure an opportunity of recommending those treatises to the *English* lawyer, exhorting him to read them again and again; for, if his great master LITTLETON has given him, as it must be presumed, a taste for luminous a method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works, in which all those advantages are combined, and the greatest portion of which is law at *Westminster* as well as at *Orleans**: for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which *every man*, according to lord COKE, *owes to his profession*.

To this venerable professor and judge, for he had sustained both characters with deserved applause, LE BRUN sent a copy of his little work;

* *Oeuvres de M. Pothier*, à Paris, chez DEBURE: 28 volumes in *duodecimo*, or 6 in *quarto*. The illustrious author died in 1772.

and M. POTHIER honoured it with a short, but complete, answer in the form of a *General Observation on his Treatises**; declaring, at the same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed*. This is the substance of his answer: “that he can discover no kind of absurdity in the usual division of *neglect* and *diligence*, nor in the *rule*, by which different *degrees* of them are applied to different contracts; that to speak with strict propriety, negligence is not *permitted* in any contract, but a *less rigorous construction* prevails in some than in others; that a *hirer*, for instance, is not considered as *negligent*, when he takes the same care of the goods hired, which the generality of mankind take of their own; that the *letter to hire*, who has his reward, must be presumed to have demanded at first no higher degree of diligence, and cannot justly complain of that *inattention*, which in another case might have been culpable; for a *lender*, who has no reward, may fairly exact from the borrower that *extraordinary degree of care*, which a *ver*

* It is printed apart, in *fourteen* pages, at the end of his treatise on the *Marriage-contract*.

“ *attentive person of his age and quality* would
 “ certainly have taken; that the diligence, which
 “ *the INDIVIDUAL party commonly uses in his*
 “ *own affairs*, cannot properly be the object of
 “ judicial inquiry; for *every* trustee, administra-
 “ tor, partner, or co-proprietor, must be *pre-*
 “ *sumed* by the court, auditors, or commissioners,
 “ before whom an account is taken, or a distri-
 “ bution or partition made, to use in *their own*
 “ concerns such diligence, as is commonly used
 “ by *all prudent men*; that it is a violation of
 “ *good faith* for any man to take less care of an-
 “ other’s property, which has been intrusted to him,
 “ *than of his own*; that, consequently, the author
 “ of the new system demands no more of a
 “ *partner* or a *joint-owner* than of a *depository*,
 “ who is bound to keep the goods deposited *as*
 “ *he keeps his own*; which is directly repugnant
 “ to the indisputable and undisputed sense of the
 “ law *Contractus*.”

I cannot learn whether M. LE BRUN ever published a reply, but am inclined to believe that his system has gained very little ground in *France*, and that the old interpretation continues universally admitted on the continent both by theorists and practisers.

Nothing material can be added to POTHIER’S argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to

set down a few general remarks on the controversy: particular observations might be multiplied without end.

The only *essential* difference between the systems of GODEFROI and LE BRUN relates to the *two* contracts, which follow the much-disputed clause; for the *Swiss* lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honesty*: now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of *Marriage-portions**.

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal; yet, even on this head, LE BRUN seems to be self-confuted: he begins with engaging to prove "that only *two* degrees of fault are distinguished by the laws of *Rome*," and ends with drawing a conclusion, that they acknowledge but *one* degree: now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of *diligence*, the *omissions* of which are *as many* neglects; exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that, which he repu-

* See p. 71. note; and p. 126.

diates. It is true, that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system*.

The disquisition amounts, in fact, to this: from the barrenness or *poverty*, as LUCRETIVS calls it, of the *Latin* language, the single word *CULPA* includes, as a generick term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the *Greek*, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words *ῥαθυμία* and *ἀμέλεια*, which are by no means synonymous, the former implying a certain '*easiness of mind* or '*remissness of attention*, while the second imports a higher and more culpable degree of *negligence*†. This observation, indeed, seems to favour the system of GODEFROI; but I lay no great

* See pages 32. 73. 74. 149.

† *Basilica*, 2, 3, 23. See *Demosth.* 3 Phil. *Reiske's* edit. l. 112. 3. For *levissima culpa*, which occurs but once in the whole body of *Roman law*, *ῥαθυμία* seems the proper word in *Greek*; and it is actually so used in the *Basilica*, 60. 3. 5. where mention is made of the *Aquilian law*, in *quá*, says ULPIAN, *et levissima culpa venit*. D. 9. 2. 44.

strefs on the mere words of the translation, as I cannot persuade myself, that the *Greek* jurists under BASILIUS and LEO were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that, which POTHIER has recommended and illustrated.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest *Year-book* or *Treatise* to the latest adjudged *Case*; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment, observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man *possesses for a time the goods of another*; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished: it will be sufficient to remark, that the rules are in general the same, by whatever means the goods *are legally* in the hands of

the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding*, or in consequence of some distinct contract.

Sir JOHN HOLT, whom every *Englishman* should mention with respect, and from whom no *English* lawyer should venture to dissent without extreme diffidence, has taken a comprehensive view of this whole subject in his judgment on a celebrated case, which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the course of his argument†.

His division of ailments into *six* sorts appears, in the first place, a little inaccurate; for, in truth, his *fifth* sort is no more than a branch of his *third*, and he might, with equal reason, have added a *seventh*, since the fifth is capable of another subdivision. I acknowledge, therefore, but *five* species of bailment; which I shall now enumerate and define, with all the

* Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. *Mulgrave* and *Ogden*.

† Lord Raym. 912.

Latin names, one or two of which lord HOLT has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MANDATUM, or *commission*; when the mandatary undertakes, without recompence, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* sorts, to *keep*, and to *employ**. 3. COMMODATUM, or *loan for use*; when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt. 5. LOCATUM, or *hiring*, which is always for a *reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary use of *the thing*; or, 2. *locatio operis faciendi*, when *work and labour*, or *care and pains*, are to be performed or bestowed on the thing delivered: or, 3. *locatio operis mercium rehendarum*, when goods are bailed for the purpose of being *carried* from place to place, either to a *publick* carrier, or to a *private* person.

I. The most ancient case, that I can find in our books, on the doctrine of DEPOSITS (there were others, indeed, a few years earlier, which turned on points of pleading), was adjudged in

* Law, b. 2. ch. 18.

the eighth of Edward II. and is abridged by FITZHERBERT*. It may be called BONION's case, from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for *seals, plate, and jewels*, and the defendant pleaded, "that the plaintiff had bailed
 "to him a chest *to be kept*, which chest was
 "locked; that the bailor himself took away the
 "key, *without informing the bailee of the contents*;
 "that robbers came in the NIGHT, *broke open*
 "the defendant's chamber, and carried off the
 "chest into the fields, where they forced the
 "lock, and took out the *contents*; that the defend-
 "ant was robbed at the same time of his own
 "goods." The plaintiff replied, "that the
 "jewels were delivered, in a chest *not locked*, to
 "be restored at the pleasure of the bailor," and
on this, it is said, issue was joined.

Upon this case lord HOLT observes, "that
 "he cannot see, why the bailee should not be
 "charged with goods *in* a chest as well as with
 "goods *out of* a chest; for," says he, "the
 "bailee has as little power over them, as to any
 "benefit that he might have from them, and as
 "great power to defend them in one case as
 "in the other†." The very learned judge was

* Mayn. Edward II. 275. Fitz. Abr. tit. Detinue, 59.

† Lord Raym. 914.

dissatisfied, we see, with Sir EDWARD COKE's reason, "that, when the jewels were locked up
 " in a chest, the bailee was not, in fact, trusted
 " with them*." Now there was a diversity of opinion, upon this very point, among the greatest lawyers of *Rome*; for "it was a question,
 " whether, if a box sealed up had been deposited,
 " the box only should be demanded in the action, or the clothes, which it contained, should
 " also be specified; and TREBATIUS insists, that
 " the box only, not the particular contents of it,
 " must be sued for; unless the things were previously shewn, and then deposited: but LABEO
 " asserts, that he, who deposits the box, deposits the
 " contents of it; and ought, therefore, to demand
 " the clothes themselves. What then, if the depository *was ignorant of the contents?* It seems to
 " make no great difference, since he took the
 " charge upon himself; and I am of opinion,
 " says ULPIAN, that, although the box was
 " sealed up, yet an action may be brought for
 " what it contained†." This relates chiefly to the form of the libel; but, surely, cases may be put, in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought, *from their nature*, to be kept with peculiar care under lock and key: it

* 4 Rep. 84.

† D. 16. 3. 1. 41.

would, therefore, be *gross* negligence in a depository to leave such a deposit in an open antichamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, therefore, it would be no more than *slight* neglect, to leave out of a drawer a box or casket, which was neither known, nor could justly be suspected, to contain diamonds; and DOMAT, who prefers the opinion of TREBATIUS, decides, “that, in such a case, the depository would only be obliged to restore the casket, as it was delivered, without being responsible for the contents of it.” I confess, however, that, anxiously as I wish on all occasions to see authorities respected, and judgment holden sacred, BONION’s case appears to me wholly incomprehensible; for the defendant, instead of having been *grossly* negligent (which alone could have exposed him to an action), seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a very special undertaking. The plea, therefore, in this case was good, and the replication, idle; nor could I ever help suspecting a mistake in the last words *alii quod non*; although RICHARD DE WINCHEDON, or whoever was the

compiler of the *table* to this Year-book, makes a distinction, that, "if jewels be bailed to me, and " *I put them* into a casket, and *thieves rob me of* " *them in the night-time*, I am answerable ; not, "if they be *delivered* to me in a chest *sealed* " *up* ;" which could never have been law, for the next oldest case, in the book of *Affise*, contains the opinion of chief justice THORPE, that " a general bailee *to keep* is not responsible, " *if the goods be stolen*, without his *gross ne-* " *glect* ;" and it appears, indeed, from FITZ-HERBERT, that the party was driven to this issue, " whether the goods were taken away by " *robbers*."

By the *Mosaick* institutions, " if a man deli- " *vered* to his neighbour MONEY OR STUFF *to* " *keep*, and it was *stolen* out of his house, and the " thief could not be found, the master of the " house was to be brought before the judge, and " to be discharged, if he could swear, that he " had not *put his hand* unto his neighbour's " *goods*†," or, as the *Roman* author of the *LEX DEI* translates it, *Nibil se nequiter geffisse* ‡ ; but a distinction seems to have been made between a

* 29. Aff. 28. Bro. Abr. tit. Bailment, pl. 7,

† Exod. xxii. 7, 8.

‡ Lib. 10. De Deposito. This book is printed in the same volume with the *Theodosian Code*, Paris, 1586.

stealing by *day* and a stealing by *night**; and “if CATTLE were bailed and stolen (by *day*, I presume), the person, who had the care of them, was bound to make restitution to the owner†;” for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge*: now sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that, when JACOB, who was, for a long time at least, a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, LABAN made him answer for them “whether stolen by *day* or stolen by *night*‡.”

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir EDWARD COKE, in his *Reports*, and afterwards deliberately inserted in his *Commentary on LITTLETON*, the great result of all his experience and learning; namely, “that a depositary is responsible, if the goods be stolen from him; unless he accept them specially *to keep as his own*,” whence he advises all depositaries to make such a spe-

* Gen. xxxi. 39.

† Exod. xxii. 12.

‡ Gen. xxxi. 39.

cial acceptance*. This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the Year-books, mere conversations on the bench, or loose arguments at the bar; and partly on **SOUTHCOTE**'s case, which he has reported and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgement given on them.

SOUTHCOTE declared in detinue, that he had delivered goods to **BENNET**, *to be by him SAFELY kept:* the defendant confessed **SUCH** delivery, but pleaded in bar, that a certain person **STOLE** them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a **SERVANT** of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reason of the judgement, says lord **COKE**, was, because the plaintiff had delivered the goods to be **SAFELY** kept, and the defendant had taken the charge of them upon himself, by accepting them on **SUCH** a delivery." Had the reporter stopped here, I do not see

* 4 Rep. 83. b. 1 Inst. 89. a. b.

what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occasioned so many reflections on the case itself; namely, “that *to KEEP* and *to keep SAFELY* are one and the same thing;” a notion which was denied to be law by the whole court in the time of chief justice HOLT*.

It is far from my intent to speak in derogation of the great commentator on LITTLETON; since it may truly be asserted of him, as QUINTILIAN said of CICERO, that *an admiration of his works is a sure mark of some proficiency in the study of the law*; but it must be allowed, that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

The pleader, who drew the replication in SOUTHCOTE’s case, must have entertained an idea, that the *blame was greater*, if a *servant* of the depositary stole the goods, than if a mere *stranger* had purloined them; since the defendant ought to have been more on his guard against a person, who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man, of whose honesty he was not morally certain: the court, we find,

* Lord Raym. 911. margin.

rejected this distinction, and also held the replication informal, but agreed, that no advantage could be taken on a *general* demurrer of such informality, and gave judgement on the substantial badness of the plea*. If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, “that, although
 “a *general* bailee to keep be responsible for
 “GROSS neglect *only*, yet BENNET had, by a
 “*special* acceptance, made himself answerable
 for ORDINARY neglect *at least*; that it was
 “ordinary neglect, to let the goods be *stolen* out
 “of his possession, and he had not averred, that
 “they were stolen *without his default*; that he
 “ought to have put them into a *safe* place; ac-
 “cording to his undertaking, and have kept
 “the key of it himself; that the *special* bailee
 “was reduced to the class of a *conductor operis*,
 “or a workman *for hire*; and that a tailor, to
 “whom his employer has delivered lace for a
 “suit of clothes, is bound, if the lace be *stolen*,
 “to restore the value of it†.” This reasoning

* 1 Cro. 815.

† “Alia est furti ratio; id enim non casui, sed levi culpæ, fermè ascribitur.” Gothofr. Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where says the annotator, “Adversus latrones parùm prodest custodia; adversus furem prodesse potest, si quis advigilet.” See also POTH. *Contrat de Louage*, n. 429. and *Contrat de Pret à usage*, n. 53. So, by justice Cot-

would not have been just, if the bailee had pleaded, as in BONION's case, that he had been *robbed by violence*, for no degree of *care* can in general prevent an open robbery: *impetūs prædonum*, says ULPIAN, *à nullo præstantur*.

Mr. Justice POWELL, speaking of SOUTHCOTE's case, which he denies to be law, admits, that, "if a man *does* undertake *specially* to keep goods SAFELY, that is a warranty, and will oblige the bailee to keep them safely against perils, where *he has a remedy over*, but not against those where he has *no remedy over**." One is unwilling to suppose, that this learned judge had not read lord COKE's report with attention; yet the case, which he puts, is precisely that which he opposes, for BENNET *did* undertake "to keep the goods SAFELY;" and, with submission, *the degree of care demanded*, not *the remedy over*, is the true measure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against *robbers* without a most express agreement†. This, I apprehend, is all that was meant by St. GERMAN, when he says, "that,

tesmore, "Si jeco grante byens a un home a garder a mon oeps, si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mez s'il soit *robbe* de mesmes les byens, il est excusable per le ley." 10 Hen. VI. 21.

* *Ld. Raym.* 912.

† 2 *Sho.* pl. 166.

“ if a man *have nothing* for keeping the goods
 “ bailed, and promise, at the time of the delivery,
 “ to restore them *safe at his peril*, he is not re-
 “ sponsible for *mere casualties** ;” but the rule
 extracted from this passage, “ that a *special ac-*
 “ ceptance to keep SAFELY will not charge the
 “ bailee against the acts of *wrongdoers†*,” to
 which purport HOBART also and CROKE are
 cited, is too general, and must be confined to
 acts of *violence*.

I cannot leave this point, without remarking,
 that a *tenant at will*, whose interest, when he has
 it rentfree, the *Romans* called PRECARIUM, stands
 in a situation exactly parallel to that of a depo-
 sitary ; for, although the contract be for *his bene-*
fit, and, in some instances, for *his benefit only*,
 yet he has an *interest* in the land till the will is
 determined, “ and, our law adds, it is the folly of
 “ the lessor, if he do not restrain him by a special
 “ condition :” thence it was adjudged, in the
Countess of Shrewsbury’s case, “ that an action
 “ will not lie against a tenant at will *generally*, if
 “ the house be burned through his neglect‡ ;”
 but, says justice POWELL, “ had the action been
 “ founded on a *special* undertaking, as that, in
 “ consideration that the lessor would let him live

* Doct. and Stud. dial. 2. chap. 38.

† Com. 135. Ld. Raym. 915.

‡ 5 Rep. 13. b.

“ in the house, he would deliver it up *in as good repair as it then was in*, such an action would “ have been maintainable.*”

It being then established, that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself *a careless and inattentive* man; a question may arise, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight*; and it seems easy to support the affirmative; since in this case the measure of diligence is *that, which the bailee uses in his own affairs*. It must however be confessed, that the character of the individual depositary can hardly be an object of judicial discussion; if he be *slightly* or even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is, that he is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suffered them to be burned, he

* *Ld. Raym.* 911.

shall restore the worth of them to the owner*. If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as fine linen or silks; in which case he ought to save the more valuable chest, and has a right to claim indemnification from the depositor for the loss of his own. Still farther; if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person†.

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

First, as in *SOUTHCOTE's* case, where the bailee, by a *special* agreement, has engaged to answer for less: "Si quid nominatim convenit," says the *Roman* lawyer, "vel plus vel minus in singulis contractibus, hoc servabitur quod initio convenit; legem enim contractui dedit‡;" but the

* *POTH. Contrat de Dépôt*, n. 29. *Stiernh. de Jure Sueon.*

l. 2. c. 5.

† *Bract.* 99. b. *Justin. Inst.* l. 3. tit. 15.

‡ *L. Contractus*, 23. *D. de reg. jur.*

opinion of CELSUS, that an agreement *to dispense with deceit* is void, as being contrary to good morals and decency, has the assent both of ULP-PIAN and our *English* courts*.

Secondly; when a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance*; for which reason *he takes upon himself*, according to JULIAN, *the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties*†.

Where things are deposited through necessity on any sudden emergence, as a fire or a shipwreck, M. LE BRUN insists, “ that the depositary must answer for *less than gross* neglect, how careless soever he may be in his own affairs; since the preceding remark, that *a man, who reposes confidence in an improvident person, must impute any loss to his own folly*, is inapplicable to a case, where the deposit was not optional; and *the law ceases with the reason of it*‡;” but that is not the *only* reason; and, though it is an additional misfortune, for a man in extreme haste and deep distress to light upon a stupid or inat-

* Doct. and Stud. dial. 2. chap. 38.

† D. 16. 35 1. 35.

‡ *De la Prestation des Fautes*, p. 77.

tentive depositary, yet I can hardly persuade myself, that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at *Rome* by a forfeiture of the double value of the goods deposited.

In these circumstances, however, a benevolent *offer* of keeping another's property for a time would not, I think, bring the case within JULIAN's rule before-mentioned, so as to make the person offering answerable for *slight*, or even *ordinary*, negligence; and my opinion is confirmed by the authority of LABEO, who requires no more than *good faith* of a *negotiorum gestor*, when "affectuione coactus, ne bona mea distrahantur, "negotiis se meis obtulerit."

Thirdly; when the bailee, improperly called a *depositary*, either *directly* demands and receives a reward *for his care*, or takes the charge of goods *in consequence of* some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and *lets out* his mental labour at a just price: thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an inn-keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners if the goods be lost or damaged through

their want of *ordinary* circumspection, as if they were to receive a stipulated recompense *for their attention and pains*; but of this more fully, when we come to the article of *biring*.

Fourthly; when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the parties. Suppose, for example, that *Charles*, intending to appear at a masked ball expected to be given on a future night, requests *George* to lend him a dress and jewels for that purpose, and that *George*, being obliged to go immediately into the country, desires *Charles* to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent.

Since, therefore, the two last cases are not, in strict propriety, *deposits*, the exceptions to the general rule are reduced to two only; and the second of them, I conceive, will not be rejected by the *English* lawyer, although I recollect no de-

cision or dictum exactly conformable to the opinion of JULIAN.

Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, consistently with common sense and common honesty, “that an action on “the case lay against a man, who had not performed his promise of redelivering, or delivering over, things bailed to him,” that judgement was *reversed*; and, in the sixth year of JAMES, judgement for the plaintiff was arrested in a case exactly similar*: it is no wonder, that the profession *grumbled*, as lord HOLT says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established†.

Among the other curious remains of *Attick* law, which philologists have collected, very little relates to the contracts, which are the subject of this essay; but I remember to have read of DEMOSTHENES, that he was advocate for a person, with whom *three* men had deposited some valuable utensil, of which they were joint-owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion;

* Yelv. 4. 50. 128.

† 2 Cro. 667. *Wheatly* and *Low*.

upon which the other *two* brought an action, but were nonsuited on their own evidence, that there was a *third* bailor, whom they had not joined in the suit; for, the truth not being proved, DEMOSTHENES insisted, *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it*; and this doctrine was good at *Rome* as well as at *Athens*, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster-hall*.

The obligation to return a deposit faithfully was, in very early times, holden sacred by the *Greeks*, as we learn from the story of GLAUCUS, who, on consulting the oracle, received this answer “that it was criminal even *to harbour a thought of with-holding deposited goods from the owners, who claimed them†*,” and a fine application of this *universal* law is made by an *Arabian* poet contemporary with JUSTINIAN, who remarks, “that life and wealth are only *deposited* with us by our creator, and, *like all other deposits*, must in due time be restored.”

II. Employment by COMMISSION was also known to our ancient lawyers; and BRACTON, the best writer of them all, expresses it by the *Roman*

* D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

† Herod. VI. 86. Juv. Sat. XIII. 199.

word, *Mandatum*; now, as the very essence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commission* is also pretty generally applied to bailees, who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word **MANDATE** as appropriated *in a limited sense* to the species of bailment now before us; nor will any confusion arise from the common acceptance of the word in the sense of a judicial command or precept, which is in truth only a *secondary* and inaccurate usage of it. The great distinction then between one sort of *mandate* and a *deposit* is, that the former *lies in fessance*, and the latter, simply *in custody*: whence, as we have already intimated, a difference often arises between the degrees of care demanded in the one contract and in the other; for, the mandatary being considered as having engaged himself, to use *a degree of diligence and attention adequate to the performance of his undertaking*, the omission of such diligence may be, according to the nature of the business, either *ordinary*, or *slight*, neglect; although a bailee of this species ought regularly to be answerable only for a violation of *good faith*. This is the common doctrine taken from the law of **ULPIAN**; but there seems, in reality, to be no exception in the present case from the general rule; for, since *good faith* itself

obliges every man *to perform his actual engagements*, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor *omit* any thing, however inconsiderable, which the nature of the act requires*: nor will a want of ability to perform the contract be any defence for the contracting party; for, though the law *exact's no impossible things*, yet it may justly require, that every man shall know his own strength, before he undertakes to do an act, and that, if he delude another by false pretensions to skill, he shall be responsible for any injury, that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or, its equivalent, *gross* neglect.

* Lord Raym. 910.

A distinction seems very early to have been made in our law between the *nonfance*, and the *misfance*, of a *conductor operis*, and, by equal reason, of a mandatary ; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it ; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *bad not built it*, the court gave judgment of nonsuit ; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable*. However, in a subsequent reign, when a similar action was commenced against one WATKINS for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which chief justice BABINGTON at length interrupted by ordering the defendant's counsel either to plead or to demur ; but serjeant ROLF chose to plead specially, and issue was taken on a *discharge* of the agreement.† Justice MARTIN objected to the action, because no tort was alleged ; and he persisted warmly in his opinion,

* .Yearb. 11. Hen. IV. 33.

† Yearb. 3. Hen. VI. 36. b. 37. a. Statb. Abr. tit. *Actions sur le cas*, pl. 20.

which seems not wholly irreconcilable to that of his two brethren; for in the cases, which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that MARTIN, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meant, as justice COKAIN and the chief justice seem to have understood him, that no such action would lie for *nonfessance*, even *though special damage had been stated*. His argument was, that the action before them *founded in covenant* merely, and required a specialty to support it; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of *misfessance*, but did not controvert the instances, which were given by the other judges.

It was not alledged in either of the cases just cited, that the defendant was to receive *pay* for the fessance of his work; but, since both defendants were described as *actually in trade*, it was not perhaps intended, that they were to work *for nothing*: I cannot however persuade myself, that there would have been any difference, had the promises been purely *gratuitous*, and had a special injury been caused by the breach of them. Suppose, for instance, that *Robert's* corn-fields are sur-

rounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish; and that, *Robert* informing his neighbour *Henry* of his intention speedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds: if, in this case, *Henry* neglect to do the work undertaken, “and the water, not having its natural course, overflow the fields of *Robert* and “spoil his corn,” may not *Robert* maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments, that might be supposed; where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss, which he sustained*; for it is, as it ought to be, a general rule, that, for every *damnum injuriæ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet*†: but the *special da-*

* Yearb. 19. Hen. VI. 49.

† D. 13. 6. 17. 3.

mage, not the assumption, is the cause of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he cannot perform the work, no process of law can enforce the performance of it.

A case in **BROOK**, made complete from the Year-book, to which he refers, *seems* directly in point; for, by chief justice **FINEUX**, *it had been adjudged*, that, “if a man assume to build a house for me by a certain day, and do not build it, *and I suffer damage by his nonfeasance*, I shall have an action on the case, as well as if he had *done it amiss* :” but it is *possible*, that **FINEUX** might suppose a consideration, though none be mentioned*.

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation*; but, whether the case really happened, or the reward, which has actually been stipulated, was omitted in the declaration, the question, “whether a man was responsible for damage to certain goods occasioned by his negligence in performing a **GRATUITOUS** promise,” came before the court, in which lord **HOLT** presided, so lately as the second year of queen **ANNE**; and

* **Bro. Abr. tit. Action sur le Case, 72.**

a point, which the first elements of the *Roman* law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in ENGLAND to *deserve*, what it certainly received, *very great consideration**.

The case was this: BERNARD had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff COGS, a motion was made in arrest of judgement on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompense for his pains*, nor that he was a *common porter*: but the court were unanimously of opinion, that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

The chief justice, as it has before been intimated†, pronounced a clear, methodical, elaborate argument; in which he distinguished bailments into *six* sorts, and gave a history of the principal authorities concerning each of them.

* *Ld. Raym.* 909—920. *1 Salk.* 26. *Com.* 133. *Farr.* 13. 131. 528.

† *P.* 301.

This argument is justly represented by my learned friend, the annotator *on the First Institute*, as “a most masterly view of the whole subject of “bailment* ;” and, if my little work be considered merely as a commentary on it, the student may perhaps think, that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist, that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the strange dialect of our forefathers, *De pipá vini carienda*†, was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which RASTELL exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise, *without any consideration alledged*; and issue was joined on a traverse of the negligence

* Hargr. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

† Reg. Orig. 110. a. see also 110. b. *De equo infirmo sanando*, and *De columbari reparando*.

and improvidence*. How any answer could have been given to these authorities, I am at a loss even to conceive: but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and supported with reasons no less cogent; for *nothing*, said Mr. Justice POWELL emphatically, *is law, that is not reason*; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of TITIVS may, and frequently does, differ from the reason of SEPTIMIUS, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many instances know what to advise, unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.

Now the *reason* assigned by the learned judge for the cases in the *Register* and *Year-books*, which were the same with COGGS and BERNARD, namely, “that the party’s SPECIAL *assumpsit* and undertaking obliged him *so* to do “the thing, that the bailor came to no damage by his neglect,” seems to intimate, that the omission of the words *salvò et secure* would have made a difference in this case, as in that of a *deposit*; but I humbly contend, that those words are implied,

* Rast. Entr. 13. b.

by the nature of a contract which lies *in fefance*, agreeably to the distinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think, that the narrowness of the proposition in this instance affects the general doctrine, which I have presumed to lay down; and, in the strong case of the shepherd, *who had a flock to keep, which he suffered through negligence to be drowned*, neither a *reward* nor a *special* undertaking are stated*: that case, in the opinion of justice TOWNSEND, depended upon the distinction between a bargain *executed* and *executory*; but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the non-fefance*†.

There seems little necessity after this, to mention the case of POWTUARY and WALTON, the *reason* of which applies directly to the present subject; and, though it may be objected that the defendant was stated as a *farrier*, and must be

* Yearb. 2 Hen. VII. 11.

† *Statb. Abr. tit. Accions sur le eas*, pl. 11. By justice Pafton, “ si un ferroux face covenant ove moy de ferrer mon chival, “ jeo die qe fil *ne ferra* mon chival, uncore jeo averai accion “ sur mon cas, qar en son default paraventure mon chival est “ perie.”

presumed to have acted in *his trade*, yet chief justice ROLLE intimates no such presumption; but says expressly, that “an action on the case lies upon this matter, *without alledging any consideration*: for the *negligence* is the cause of action, and not the *assumpsit**.”

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work*; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *special* acceptance: for instance, if *Stephen* desire *Philip* to carry a diamond-ring from *Bristol* to a person in *London*, and he put it *with bank-notes of his own* into a letter-case, out of which it is *stolen* at an inn, or seized by a robber on the road, *Philip* shall not be answerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but, if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to *Stephen*: every thing, therefore, that has been expounded

in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species.

Since we have nothing in these cases analogous to the judgements of *infamy*, which were often pronounced at *Rome* and *Athens*, it is hardly necessary to add, what appears from the speech of CICERO for S. ROSCIUS of *Ameria*, that “the ancient *Romans* considered a mandatary as *infamous*, if he broke his engagement, not only by actual *fraud*, but even by *more than ordinary negligence*.”

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatary is responsible, almost all, that has been advanced before in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and *without his knowledge*, is the *negotiorum gestor* of the civilians, and the obligation resulting from

* “In privatis rebus, si quis rem *mandatam* non modo *malitiosius* gessisset, sui quaestus aut commodi causa, verum etiam *negligentius*, cum majores summum admisisset dedecus existimabant: itaque *mandati* constitutum est iudicium, non minus *turpe* quam *furti*.” Pro S. Rosc. p. 116. *Glasg.*

his implied contract has been incidentally mentioned in a preceding page.

III. On the third species of bailment, which is one of the most usual and most convenient in civil society, little remains to be observed; because our own, and the Roman, law are on this head perfectly coincident. I call it, after the *French* lawyers, *loan for use*, to distinguish it from their *loan for consumption*, or the *MUTUUM* of the *Romans*; by which is understood the lending of *money, wine, corn*, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity*: this latter contract, which, according to St. GERMAN, is most properly called a *loan*, does not belong to the present subject; but it may be right to remark, that, as the *specifick* things are not to be returned, the *absolute* pro-

* Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this passage from *Bracton* is cited by the chief justice, *mutuam* is printed for *commodatam*; but what then can be made of the words *ad IPSAM restituendam*? There is certainly some mistake in the passage, which must be very ancient, for the oldest MS. that I have seen, is conformable to *Tottel's* edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from *Justinian*, whom *Bracton* copied: "At is, qui *mutuum* accepit, obligatus remanet," si forte incendio, &c. *Inst.* 3. 13. 2.

perty of them is transferred to the borrower, who must bear the loss of them, if they be destroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in question; for a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought to be redelivered *specifically*; and the owner must abide the loss, if they perish through any accident, which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, “which the law, says the rule, never demands;” for that maxim relates merely to things *absolutely* impossible; and it was not only *very possible*, but *very expedient*, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care, than that of which *such* a person was capable; as, if *Paul* lend a fine horse to a raw youth, he cannot exact the same degree of management and cir-

cumspection, which he would expect from a riding master or an officer of dragoons.

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction before made between simple *theft* and *robbery*†, it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove, that they were purloined notwithstanding his *extraordinary* care. The example, given by JULIAN, is the first and best that occurs: *Caius* borrows a silver ewer of *Titius*, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, *Caius* appears to be wholly blameless, and *Titius* has suffered *damnum sine injuria*. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the *principal* thing bailed, must be extended to such *accessory* things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Although the laws of *Rome*, with which those

* Dumoulin, tract. *De eo quod interest*, n. 185.

† See p. 370. and note†.

of *England* in this respect agree, most expressly decide, that a borrower, using more than ordinary diligence, *shall not be chargeable, if there be a force which he cannot resist**, yet PUFENDORF employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion; namely, “that the borrower ought to indemnify the lender, if the goods lent be destroyed by fire, shipwreck, or other inevitable accident, and *without his fault*, unless *his own* perish with them:” for example, if *Paul* lend *William* a horse worth thirty guineas to ride from *Oxford* to *London*, and *William* be attacked on a heath in that road by highwaymen, who kill or seize the horse, he is obliged, according to PUFENDORF and his annotator, to pay thirty guineas to *Paul*. The justice and good sense of the contrary decision are evinced beyond a doubt by M. POTHIER, who makes a distinction between those cases, where the loan was the occasion merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those, where the loan was the sole efficient cause of his damage†; as if *Paul*, having lent his horse, should be forced in the interval by some pressing business to hire an-

* D. 44. 7. 1. 4. Ld. Raym. 916.

† Poth. Prêt à Usage, n. 55. Puf. with Barbeyrac's notes, B. 5. C. 4. § 6..

other for himself; in this case the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience *caused* by the loan; for, in this sense and in this instance, *a benefit conferred should not be injurious to the benefactor*. As to a condition *presumed* to be imposed by the lender, that he would not abide by any loss *occasioned* by the lending, it seems the wildest and most unreasonable of presumptions: if *Paul* really intended to impose such a condition, he should have declared his mind; and I persuade myself, that *William* would have declined a favour so hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case, cited by *St. German* from the *Summa Rosella*, where a *loan* must be meant, though the word *depositum* be erroneously used*; and it is there decided, that, if the borrower of a horse will in-

* *Dist.* and *Stud.* where before cited.

prudently ride by *a ruinous house in manifest danger of falling*, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were *in good condition* and *fell* by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger, reason, if *William*, instead of coming to *London*, for which purpose the horse was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes responsible for any *accident*, that may befall the horse in his journey to *Bath*, or after the expiration of the week*.

Thus, if *Charles*, in a case before put†, wear the masked habit and jewels of *George* at the ball, for which they were borrowed, and be *robbed* of them in his return home at the usual time and by the usual way, he cannot be compelled to pay *George* the value of them; but it would be otherwise, if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by *GAIUS* in the digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his ob-

* *Ld. Raym.* 915.† *P.* 377.

ligation to indemnify the lender, if the plate be lost by accident however irresistible.

There are other cases, in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of *Caius* be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer, which he had borrowed of *Titius*, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been preferred, had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay *Titius* the value of that, which he has lost; unless the alarm was so sudden, and the fire so violent, that no deliberation or selection could be justly expected, and *Caius* had time only to snatch up the first utensil, that presented itself.

Since openness and honesty are the soul of contracts, and since “a suppression of truth is often as culpable as an express falsehood,” I accede to the opinion of M. POTHIER, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were to conceal from him, that his own horse was as fit for the service, and if the horse, so bor-

rowed, were slain in the engagement, the lender ought to be indemnified; for probably the dissimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged, *that he was unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day.

If the bailee, to use the *Roman* expression, be *IN MORA*, that is, if *a legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases, where it may be strongly presumed, that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee have legally tendered the thing, and the bailor have put himself *in mora* by refusing to accept it: this rule extends of course to every species of bailment.

“Whether, in case of a *valued loan*.

“the goods lent are *estimated at a certain price*,

“the borrower must be considered as bound *in*

“*all events* to restore either the things lent or

“the value of them,” is a question, upon which

the civilians are as much divided, as they are upon

the celebrated clause in the law *Contractus*: five

or six commentators of high reputation enter

the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament. D'AVEZAN supports the affirmative; and POTHIER, the negative; but the second opinion seems the more reasonable. The word PERICULUM, used by ULPIAN, is in itself equivocal: it means *bazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the *Roman* lawyer in the passage, which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the *Customary Provinces* of FRANCE, or in ENGLAND, a borrower can be chargeable for all events *without his consent unequivocally given*: if *William*, indeed, had said to *Paul* alternatively, "I promise, on my return to *Oxford*, either to restore your horse or to pay you thirty guineas," he must in all events have performed one part of this disjunctive obligation*; but, if *Paul* had only said, "the horse, which I lend you for this journey, is fairly worth thirty guineas," no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence, which the nature of the contract required.

* Palm. 651.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use, in which the lender has a *common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if *Stephen* and *Philip* invite some common friends to an entertainment prepared at their joint expence, for which purpose *Philip* lends a service of plate to his companion, who undertakes the whole management of the feast, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as, if a passionate lover of musick were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; but here again, the bailment is not so much a *loan*, as a *mandate*; and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the instrument,

and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss, and a brother-musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with DESPEISSES, a learned advocate of *Montpellier* and writer on *Roman* law, that the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of MOSES, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence*, of the OWNER; for, says the divine legislator, “if a
“man borrow aught of his neighbour, and it be
“hurt or die, *the owner thereof not being with it*,
“he shall surely make it good; but, if the *owner*
“thereof *be* with it, he shall *not* make it good*.”
now it is by no means *certain*, that the original word signifies the *owner*, for it *may* signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended, that the borrower should always

* Exod. xxii. 14, 15.

answer for casualties, *except in the case*, which must rarely happen, of *the owner's presence*, this exception seems to prove, that no casualties were meant, but such as *extraordinary* care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old *Athenian* law is preserved by DEMOSTHENES, from which little can be gathered on account of its generality and the use of an ambiguous word*; it is understood by PETIT as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

IV. As to the degree of diligence, which the law requires from a *pawnee*, I find myself again obliged to dissent from sir EDWARD COKE, with whose opinion a similar liberty has before been taken in regard to a *depository*; for that very learned man

* Περὶ οὗ καθεστὸς τις ἐπιμέλει ἐπιμετέμεναι, ὡς περὶ τὰ αὐτῶν ἴχνη. *Reiske's* edition, 855. 3. Here the verb καθεστῆναι, may imply *flight*, or *ordinary*, neglect; or even *fraud*, as *Petit* has rendered it.

lays it down, that, “ if goods be delivered to
 “ one as a *gage* or *pledge*, and they be *stolen*,
 “ he shall be discharged, because *he hath a pro-*
 “ *perty* in the.n ; and, *therefore*, he ought to
 “ keep them *no otherwise than his own**.” I
 deny the first proposition, the reason, and the
 conclusion.

Since the bailment, which is the subject of the
 present article, is beneficial to the *pawnee* by se-
 curing the payment of his debt, and to the *pawnor*
 by procuring him credit, the rule, which natu-
 ral reason prescribes, and which the wisdom of
 nations has confirmed, makes it requisite for the
 person, to whom a gage or pledge is bailed, to
 take *ordinary* care of it; and he must consequently
 be responsible for *ordinary* neglect†. This is
 expressly holden by BRACTON; and, when I rely
 on his authority, I am perfectly aware, that he
 copied JUSTINIAN almost word for word, and
 that lord HOLT, who makes considerable use of
 his treatise, observes three or four times, “ that
 “ he was an *old* author‡;” but, although he had
 been a civilian, yet he was also a great com-
 mon-lawyer, and never, I believe, adopted the
 rules and expressions of the *Romans*, except
 when they coincided with the laws of *England*

* 1 Inst. 89. a. 4 Rep. 83. b.

† Bract. 99. b.

‡ 1d. Raym. 915, 916, 919.

in his time: he is certainly the *best* of our juridical clafficks; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine in question has the full assent of lord HOLT himself, who declares it to be “*sufficient*, if the pawnee use *true*, and *ordinary*, diligence for restoring the goods, and that, so doing, he will be indemnified, and, notwithstanding the loss, shall resort to the pawnor for his debt.” Now it has been proved, that “a bailee cannot be considered as using *ordinary* diligence, who suffers the goods bailed to be taken by *stealth* out of his custody*,” and it follows, that “a pawnee shall not be discharged, if the pawn be simply *stolen* from him; but if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the *Roman* institutes, which BRACTON has nearly transcribed, by no means convinces M. LE BRUN, that a *pawnee* and a *borrower* are not responsible for *one and the same* degree of negligence; and it is very certain, that

* P. 370. note†.

ULPIAN, speaking of the *Actio pignoratitia*, uses these remarkable words: “ Venit in hac actione
 “ et *dolus* et *culpa* UT in *commodato*, venit et *cus-*
 “ *todia* ; vis major non venit.” To solve this difficulty, NOODT has recourse to a conjectural emendation, and supposes UT to have been inadvertently written for AT; but, if this was a mistake, it must have been pretty ancient, for the *Greek* translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occasion for so hazardous a mode of criticism. ULPIAN has not said, “ *talis culpa qualis* in *commodato* ;” nor does the word UT imply an *exact* resemblance: he meant, that a pawnee was answerable for *neglect*, and gave the first instance, that occurred, of another contract, in which the party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions PIGNUS among other contracts *reciprocally useful*, and distinguishes it from COMMODATUM, whence the borrower *solely* derives advantage*.

It is rather less easy to answer the case in the book of *Affise*, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system†; for there, in

* Before, p. 370.

† 29 Aff. pl. 28.

an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, “ that it was delivered to him “ *in gage* for a certain sum of money; that he “ had put it among his other goods; and that all “ together had been *stolen* from him:” now, according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, “ that he *tendered* the money before the *stealing*, and that the creditor refused to accept it,” on which fact issue was joined; and the reason, assigned by the chief justice, was, that, “ if a “ man bail goods to me *to keep*, and I put them “ among my own, I shall not be charged, if they “ be *stolen*.” To this case I answer: first, that, if the court really made no difference between a *pawnee* and a *depository*, they were indubitably mistaken; for which assertion I have the authority of BRACTON, lord HOLT, and St. GERMAN, who ranks the taker of a *pledge* in the same class with a *birer* of goods*; next, that in a much later case, in the reign of HEN. VI. where a *biring of custody* seems to be meant, the distinction between a *theft* and a *robbery* is taken agreeably to the *Roman law*†; and, lastly, that, although in the strict propriety of our *English* language, to *steal* is to take *clandestinely*, and to *rob*

* Doct. and Stud. *dial 2. ch. 38.*

† Before, p. 370. note†.

is to seize by *violence*, corresponding with the *Norman* verbs *emleer* and *robber*, yet those words are sometimes used inaccurately; and I always suspected, that the case in the book of *Affise* related to a *robbery*, or a taking *with force*; a suspicion confirmed beyond any doubt by the judicious BROOK, who abridges this very case with the following title in the margin, “*Que serra al perde, quant les biens sont robbes**.” and, in a modern work, where the old cases are referred to, it appears to have been settled, in conformity to them and to reason, “that if the pawn be laid up, and the pawnee be *robbed*, he shall not be answerable†:” but lord COKE seems to have used the word *stolen* in its proper sense, because he plainly compares a pawn with a deposit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, the whole property is instantly *revested in the pledgor*, and he may consequently maintain an action of *trover*‡: it is said in a most useful work, that by such tender and refusal the thing pawned “ceases to be a pledge and becomes a *deposit*§;” but this must be an error

* *Abr. tit. Bailment*, pl. 7.

† 2 Salk. 522.

‡ 29 Aff. pl. 28. Yelv. 179. *Ratcliff and Davis*.

§ *Law of Nisi Prius*, 72.

of impressi^on ; for there can never be a *deposit* without the owner's consent, and a *depository* would be chargeable only for *gross* negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or to relinquish his debt*.

The reason, given by COKE for his doctrine, namely, " because the pawnee has a *property* in " the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species ; for every bailee has a temporary *qualified* property in the things, of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger, who may damage or purloin them†. By the *Roman* law, indeed, " even the possession of the " depository was holden to be that of the person " depositing ;" but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care: he may not, however, *use* them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed ; and this presumption varies, as the thing is likely to be better, or worse, or not at all af-

* *Ld. Raym.* 917. † *Yearb.* 21 Hen. VII. 14. b. 15. a.

fectcd, by usage; since, if *Caius* deposit a *setting-dog* with *Titius*, he can hardly be supposed unwilling, that the dog should be used for partridge-shooting, and thus be confirmed in those habits, which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine, that he would suffer them to be worn; and, on the other hand, it may justly be inferred, that he would gladly indulge *Titius* in the liberty of using the *books*, of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods, which will be *impaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sporting-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and she wear them at a publick place, and be *robbed* of them on her return, she must make them good: “if she keeps them in a bag,” says a learned and respectable writer, “and they are *stolen*, she shall not be charged*,” but the bag could hardly be taken *privately and quietly* without her omission of or-

* Law of *Nisi Prius*, 72.

dinary diligence; and the manner, in which lord HOLT puts the case, establishes my system, and confirms the answer just offered to the case from the Year-book; for, “if she keep the jewels,” says he, “*locked up* in her cabinet, and “her cabinet be *broken open*, and the jewels taken “thence, she will not be answerable*.” Again; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge†; and this doctrine must be equally applicable to a general bailee, who ought neither to be injured nor benefited in any respect by the trust undertaken by him; but the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable charges of their nourishment‡. It follows from these remarks, that lord COKE has assigned an inadequate reason for the degree of diligence, which is demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him.

* *Ld. Raym.* 917.

† *Ow.* 124.

‡ *Poth. Dépôt*, n. 47. *Nantissement*, n. 35.

But, if the receiver in pledge *were* the only bailee, who had a *special property* in the thing bailed, it could not be logically inferred, “that, *therefore*, he ought to keep it merely as his *own* :” for, even if *Caius* have an absolute undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well as positive, law to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns ; since every man ought to use *ordinary* diligence in affairs, which interest *another* as well as himself : “ *Aliena negotia,*” says the emperor CONSTANTINE, “ *exacto officio geruntur**.”

The conclusion, therefore, drawn by sir EDWARD COKE, is no less illogical than his premisses are weak ; but here I must do M. LE BRUN the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of *English* law ; namely, that a person, who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods ; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own ; and, if that was LE BRUN’s hypothesis, he has done little more than adopt the system of GODE-

* C. 4. 35. 21.

FROI, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

Pledges for debt are of the highest antiquity: they were used in very early times by the roving *Arabs*, one of whom finely remarks, "that the life of man is no more than a *pledge* in the hands of *Destiny*;" and the salutary laws of *Moses*, which forbade certain implements of husbandry and a widow's raiment to be given in pawn, deserve to be imitated as well as admired. The distinction between *pledging*, where possession is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attick*; but scarce any part of the *Athenian* laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of *DEMOSTHENES*.

I cannot end this article, without mentioning a singular case from a curious manuscript preserved at *Cambridge*, which contains a collection of queries in *Turkish*, together with the decisions or concise answers of the *MUFTI* at *Constantinople*: it is commonly imagined, that the *Turks* have a translation in their own language of the *Greek* code, from which they have supplied the defects of their *Tartarian* and *Arabian* jurisprudence*;

* *Duck de Auth. Jur. Civ. Rom. l. 2. 6.*

but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded, that their numerous treatises on *Mahomedan* law are worthy on many accounts of an attentive examination. The case was this: “ *Zaid* had left with *Amru* divers
 “ goods in pledge for a certain sum of money,
 “ and some *ruffians*, having entered the house of
 “ *Amru*, took away his own goods together
 “ with those pawned by *Zaid*.” Now we must necessarily suppose, that the creditor had by *his own fault* given occasion to this robbery; otherwise we may boldly pronounce, that the *Turks* are wholly unacquainted with the imperial laws of BYZANTIUM, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask, “ whether, *since the debt became*
 “ *extinct by the loss of the pledge*, and since the
 “ goods pawned exceeded in value the amount
 “ of the debt, *Zaid* could legally demand the
 “ balance of *Amru* ;” to which question the great law-officer of the *Othman* court answered with the brevity usual on such occasions, OLMAZ, *It cannot be**. This custom, we must con-

* Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. *Hywel Dda.* lib. 2. cap. 2. § 29. note x. It may possibly be the usage in *Turkey* to stipulate “ ut amisso pignoris liberet debitorum,” as in C. 4. 24. 6.

fels, of proposing cases both of law and conscience under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality and to save the charges of litigation.

V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

1. *Locatio*, or *locatio-conductio*, *REI*, is a contract, by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price, of the hiring; so that, in truth, it bears a strong resemblance to the contract of *emptio-venditio*, or *SALE*; and, since it is advantageous to *both* contracting parties, the harmonious consent of nations will be interrupted, and one object of this essay defeated, if the laws of *England* shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication, that I have read on any legal subject, it is expressly said, “that the hirer is to take *all imaginable* “care of the goods delivered for hire* :” the

* Law of *Nisi Prius*, 3d edition corrected, 72.

words *all imaginable*, if the principles before established be just, are too strong for practice even in the strict case of *borrowing*; but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of lord HOLT in the case of *COGGS and BERNARD*, where the great judge lays it down, “that, if goods are let out “for a *reward*, the *birer* is bound to the *UTMOST* “diligence, such as the *MOST diligent father of* “*a family* uses*.” It may seem bold to controvert so respectable an opinion; but, without insisting on the palpable injustice of making a *borrower* and a *birer* answerable for precisely the *same* degree of neglect, and without urging, that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the chief justice was entirely grounded on a grammatical mistake in the translation of a single *Latin* word.

In the first place, it is *indubitable* that his lordship relied *solely* on the authority of *BRAC-
TON*; whose words he cites at large, and immediately subjoins, “*whence it appears, &c.*” now the words, “*talis ab eo desideratur custodia,* “*qualem DILIGENTISSIMUS paterfamilias suis*

“*rebus adhibit*,” on which the whole question depends, are copied exactly from JUSTINIAN*, who informs us in the *procme* to his Institutes, that his decisions in that work were extracted *principally from the Commentaries of GAIUS*; and the epithet *diligentissimus* is in fact used by this ancient lawyer †, and by him alone, on the subject of hiring: but GAIUS is remarked for writing with energy, and for being fond of using *superlatives*, where all other writers are satisfied with *positives*‡; so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words THEOPHILUS rendered more than literally, and BRACTON transcribed; and thus an epithet, which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the *pandects* with the *institutes*, which, together with the *code*, form *one connected work*§, and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. DE FERRIERE, who ima-

* Bract. 62. b. Justin. Inst. 3. 25. 5. where *Theophilus* has
 ὁ ἐπίσης ἐπιμελεστάτος.

† D. 19. 2. 25. 7. ‡ Le Brun, p. 93. § Burr. 426.

gines, that both JUSTINIAN and GAIUS are speaking only of cases, which *from their nature* demand *extraordinary* care *.

There is no authority then against the rule, which requires of a *hirer* the same degree of diligence, that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods; and the just distinction between *borrowing* and *hiring*, which the *Jewish* lawgiver emphatically makes, by saying, "if it be an hired thing, *it came for its hire* †," remains established by the concurrent wisdom of nations in all ages.

If *Caius* therefore hire a horse, he is bound to ride it as moderately and treat it as carefully, as any man of *common discretion* would ride and treat his own horse; and if, through his negligence, as by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as by travelling at unusual hours, or by taking an unusual road: if, indeed, he hire a carriage and any number of horses, and the owner send with them his postilion or coachman, *Caius* is discharged from all attention to the horses, and remains obliged only to

* *Inst.* vol. V. p. 138.

Exod. xxii. 15.

take ordinary care of the glasse and inside of the carriage, while he sits in it.

Since the negligence of a servant, *acting under his master's directions express or implied*, is the negligence of the master, it follows, that, if the *servant* of *Caius* injure or kill the horse by riding it immoderately, or, by leaving the stable-door open, suffer thieves to steal it, *Caius* must make the owner a compensation for his loss*; and it is just the same, if he take a ready-furnished lodging, and his guests, or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At *Rome* the law was not quite so rigid; for *POMPONIUS*, whose opinion on this point was generally adopted, made the master liable, only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have known†: but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those, whom he receives or employs, compels him to keep a vigilant eye on all his domesticks, is not only more simple, but more conducive to the public security, although it may be rather harsh

* Salk. 282. Ld. Raym. 619.

† D. 19. 2. 11.

in some particular instances *. It may here be observed, that this is the only contract, to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb *bailler*, to deliver; and, though the contracts, which are the subject of this essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that *every prudent person* would use, if the orchard, garden, or farm, were his own.

2. *Locatio OPERIS*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vebendarum*, has a most extensive influence in civil life; but the principles, by which the obligations of the contracting parties may be ascertained, are no less obvious and rational, than the objects of the contract are often vast and important †.

* Poth. *Louage*, n. 193.

† It may be useful to mention a nicety of the *Latin* language in the application of the verbs *locare* and *conducere*: the em-

If *Titius* deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their several undertakings in a workmanly manner*: but, *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants. It has, indeed, been adjudged, that, if the horse of a guest be sent *to pasture* by the owner's desire, the innholder is not, *as such*, responsible for the loss

ployer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. HEINECC. in *Pand.* par. 3. § 320. So, in *Horace*,

“ Tu secunda marmora

“ *Locas*”—

which the stonchewer or mason *conduxit*.

* 1 Vent. 268. erroneously printed 1 Vern. 268. in all the editions of *Bl. Comm.* II. 452. The innumerable multitude of inaccurate or idle references, in our best reports and law-tracts, is the bane of the student and of the practitioner.

of him by *th:ft* or accident * ; and, in the case of MOSLEY and FOSSET, an action against an agister for keeping a horse *so negligently that it was stolen*, is said to have been held maintainable *only* by reason of a *special* assumption † ; but the case is differently reported by ROLLE, who mentions no such reason ; and, according to him, chief justice POPHAM advanced generally, in conformity to the principles before established, that, “ if a man, to whom horses are “ bailed for agistment, *leave open the gates of* “ *his field*, in consequence of which neglect “ they stray and are *stolen*, the owner has an “ action against him :” it is the same, if the innkeeper send his guest’s horse to a meadow of *his own accord*, for he is bound to keep safely all such things as his guests deposit *within his inn*, and shall not discharge himself by his own act from that obligation ; and, even when he turns out the horse *by order of the owner*, and receives pay for his grass and care, he is chargeable, surely, for *ordinary* negligence, as a *bailee for hire*, though not as an innkeeper by the general custom of the realm. It may be worth while to investigate the reasons of this *general custom*, which in truth means no more than *common law*, concerning innholders* ,

* 8 Rep. 32. *Cayle’s case*, † Mo. 543. 1 Ro. Abr. 4.

† Reg. Orig. 105. a. Noy, Max. ch. 43.

Although a stipend or reward in *money* be the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts, or, whenever a valuable consideration of any kind is given or stipulated. This is the case, where the contract *do ut des* is formed by a *reciprocal bailment for use*, as if *Robert* permit *Henry* to use his *pleasure-boat* for a day, in consideration that *Henry* will give him the use of his *chariot* for the same time; and so in ten thousand instances, that might be imagined, of *double bailments*: this too is the case, if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if *Charles* give *George* a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des*; and, in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserv-

ing the things, with which they are intrusted : so, when *Jacob* undertook the care of *Lában's* flocks and herds for no less a reward than his younger daughter, whom he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant, as if he had been paid in shekels of silver.

Now the obligation is precisely the same, as we have already hinted*, when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract*; and, though an innholder be not paid in money for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be considered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *GAIUS* and, as great a man as he, lord *HOLT*, seem to view the obligation; for they agree, "that, although a bargeman
" and a master of a ship, receive their fare for
" the passage of travellers; and an innkeeper
" his pay for the accommodation and enter-
" tainment of them, but have no pecuniary re-
" ward for the *mere custody* of the goods be-

* P. 375, 376.

“longing to the passengers or guests, yet they
 “are obliged to take *ordinary* care of those
 “goods; as a fuller and a mender are paid for
 “their *skill only*, yet are answerable, *ex locato*,
 “for *ordinary* neglect, if the clothes be lost or
 “damaged*.”

In whatever point of view we consider this bailment; no more is *regularly* demanded of the bailee than the care, which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it*, by *any person whatever* †; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, *because there are suspected persons in the house, for whose conduct he cannot be answerable* ‡: it is otherwise, indeed, if he refuse admission to a traveller, because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent §.

Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the publick, his

* D. 4. 9. 5. and 12 Mod. 487.

† Yearb. 10 Hen. VII. 26. 2 Cro. 189.

‡ Mo. 78. § Dy. 158. b. 1 And. 29.

negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests, who sleep in his chambers*. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of publick utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to POMPONIUS, *his desire of securing the public from the dishonesty of such men*, and by his *edict* gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident*; and ULPIAN intimates, that even this severity could not restrain them from knavish practices or suspicious neglect†.

* 1 Bl. Comm. 430.

† D. 4. 9. 1. and 3.

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force*, which occasioned the loss or damage, was truly *irresistible*.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiæ*, and might have been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he *lets out* for pay, are in truth a mental *operation*. Whatever be his appellation, either in *English* or *Latin*, he is clearly responsible, like other interested bailees, for *ordinary* negligence; and, although St. GERMAN seems to make no difference in this respect between a *keeper of goods for hire* and a *simple depositary*, yet he uses the word *DEFAULT*, like the *CULPA* of the *Romans*, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law*.

In the sentence immediately following, he makes a very material distinction between the two contracts; for, “if a man, says he, have

* *Dott. and Stud.* where before cited.

“ *a certain recompense for the keeping of goods,*
 “ *and promise, at the time of the delivery, to*
 “ *redeliver them safe at his peril,* then he shall
 “ be charged with *all chances*, that may befall;
 “ but, if he make *that* promise, and *have*
 “ *nothing* for keeping them, he is bound to *no*
 “ *casualties*, but such as are wilful, and happen
 “ *by his own default :*” now the word PERIL,
 like *periculum*, from which it is derived, is in
 itself ambiguous, and sometimes denotes the
risk of inevitable mischance, sometimes the *dan-*
ger arising from a want of due circumspection;
 and *the stronger sense* of the word *was taken* in
 the first case *against him, who uttered it*; but, in
 the second, where the construction is favour-
 able, the *milder sense* was justly preferred*.
 Thus, when a person, who, if he were wholly
uninterested, would be a *mandatary*, undertakes
 for a *reward* to perform *any work*, he must be
 considered as bound still more strongly, *to use a*
degree of diligence adequate to the performance of
it: his obligation must be rigorously construed,
 and he would, perhaps, be answerable for *slight*
 neglect, where no more could be required of a
mandatary than *ordinary exertions*. This is the
 case of commissioners, factors, and bailiffs, when
 their undertaking *lies in fessance*, and not simply

* See before, p. 370.

in *custody*: hence, as peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the shaft or the capital, GAIUS seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation*. Lord COKE considers a factor in the light of a *servant*, and thence deduces his obligation; but, with great submission, his *reward* is the true reason, and *the nature of the business*, is the just measure, of his duty†; which cannot, however, extend to a responsibility for *mere accident* or *open robbery*‡; and, even in the case of *theft*, a factor has been holden excused, when he shewed, “that he had *laid up* the goods of his principal “in a warehouse, out of which they were “*stolen* by certain malefactors to him unknown §.”

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a *due application of the necessary art*: it is his own fault, if he undertake a work above his strength; and all, that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor*

* D. 19. 2. 7. † 4 Rep. 84. Ld. Raym. 918.

‡ 1 Inst. 89. 2. § 1 Vent. 121. Vere and Smith

*operis faciendi**. I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man, who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability†. The case, which SADI relates with elegance and humour in his *Gulistan* or *Rose-Garden*, and which PUFENDORF cites with approbation‡, is not inapplicable to the present subject, and may serve as a specimen of *Mabomedan law*, which is not so different from ours, as we are taught to imagine: ‘A man, who had a disorder in his eyes, called on a *farrier* for a remedy; and he applied to them a medicine commonly used for *his* patients: the man lost his sight, and brought an action for damages; but the judge said, “No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier* ;” and SADI proceeds to intimate, that, “if a person will employ a common *mat-maker* to weave or embroider a *fine carpet*, he must impute the bad workmanship to his own folly§.”

* *Spondet*, say the Roman lawyers, *peritiam artis*.

† P. 381. ‡ De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

§ Rofar. Polit. cap. 7. There are numberless tracts in

In regard to the distinction before-mentioned between the *nonfescance* and the *misfescance* of a workman*, it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly *implied*; of which BLACKSTONE gives the following instance: “ If a *builder* promises, “ undertakes, or assumes to *Caius*, that he will “ build and cover his house within a time limited, and fails to do it, *Caius* has an action “ on the case against the builder for this breach “ of his express promise, and shall recover a “ pecuniary satisfaction for the injury sustained “ by such delay†.” The learned author meant, I presume, a *common* builder, or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *nonperformance* of a *mandatary*‡:

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether

Arabick, *Persian*, and *Turkish*, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own; nor would it be less easy, to explain in *Persian* or *Arabick* such parts of our *English* law, as either coincide with that of the *Asiatics*, or are manifestly preferable to it.

* P. 382, &c. † 3 Comm. 157. ‡ P. 383, 384, 385.

conductor rei or *conductor operis*, must be supposed to know, that the goods and chattels of his bailor are in *many* cases *distrainable* for rent, if his landlord, who might otherwise be shamefully defrauded, find them on the premises*; and, as they cannot be distrained and sold without his *ordinary* default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss†: even if a *depository* were to remove or conceal *his own* goods, and those of his depositor were to be seized for rent-arrears, he would unquestionably be bound to make restitution; but there is no obligation in the bailee to *suggest wise precautions against inevitable accident*; and he cannot, therefore, be obliged *to advise insurance from fire*; much less *to insure* the things bailed without an authority from the bailor.

It may be right also to mention, that the distinction, before taken in regard to *loans*‡, between an obligation to restore the *specifick* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case, it is a regular *bailment*; in the second, it becomes a *debt*. Thus, according to ALFENUS in his famous law, on which the judicious

* Burr. 1498. &c. † 3. Bl. Comm. 8. ‡ P. 392.

BYNKERSHOEK has learnedly commented, “ if
 “ an ingot of silver be delivered to a silver-
 “ smith to make an urn, the *whole* property is
 “ transferred, and the employer is only a *credi-*
 “ *tor* of metal equally valuable, which the
 “ workman engages to *pay* in a certain shape* :”
 the smith may consequently apply it to his own
 use ; but, if it perish, even by unavoidable mis-
 chance or irresistible violence, he, as owner of
 it, must abide the loss, and the creditor must
 have his urn in due time. It would be other-
 wise, no doubt, if the *same* silver, on account
 of its peculiar fineness, or any uncommon
 metal, according to the whim of the owner,
 were agreed to be *specifically* redelivered in the
 form of a cup or a standish.

3. *Locatio operis* MERCIUM VEHENDARUM
 is a contract, which admits of many varieties
 in *form*, but of none, as it seems *at length* to
 be settled, in the *substantial* obligations of the
 bailee.

A carrier for hire ought, by the rule, to be
 responsible only for *ordinary* neglect ; and, in
 the time of HENRY VIII. it appears to have
 been generally holden, “ that a *common* carrier
 “ was chargeable, in case of a loss by robbery,
 “ only when he had travelled by *ways danger-*

* D. 19. 2. 31. Bynk. *Obs. Jur. Rem.* lib. VIII.

“ *ous for robbing, or driven by night, or at any*
 “ *inconvenient hour** :” but, in the commercial reign of ELIZABETH, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of *innholders*, “ that, if a *common carrier* be robbed
 “ of the goods delivered to him, he shall answer for the value of them†.”

Now the *reward* or *hire*, which is considered by sir EDWARD COKE as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force*; and, though some other bailees have a *recompense*, as *factors* and *workmen for pay*, yet, even in *Woodlief's* case, the chief justice admitted, that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier* : the true ground of that resolution is the *publick employment* exercised by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of society ‡.

The modern rule concerning a *common carrier* is, that “ nothing will excuse him, except *the*

* Doct. and Stud. where often before cited.

† 1 Inst. 89. 2. Mo. 462. 1 Ro. Abr. 2. *Woodlief and Curties*;

‡ 1 Ld. Raym. 917. 12 Mod. 487.

“*act of God, or of the King's enemies** ;” but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not, *regularly*, for damage occasioned by the attacks of *ruffians*, any more than for *hostile violence*, or unavoidable *misfortune* ; but the great maxims of policy and good government make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains with little or no chance of detection.

Although the *Act of God*, which the ancients too called *Θεῶν ἰσχύς* and *Vim divinam*, be an expression, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place *inevitable accident*: religion and reason, which can never be at variance without certain injury to one of them, assure us, that “not a gust of wind blows, nor
“a flash of lightning gleams, without the
“knowledge and guidance of a superintending
“mind ;” but this doctrine loses its dignity and sublimity by a technical application of it,

* *Law of Nis Prius*, 70, 71

which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, "that the ship
" was tight, when the goods were placed on
" board, but that a rat, by gnawing out the
" oakum, had made a small hole, through
" which the water had gushed*;" but the true reason of this decision is not mentioned by the reporter: it was in fact *at least ordinary* negligence, to let a rat do such mischief in the vessel; and the *Roman* law has, on this principle, decided, that, "*si fullo vestimenta polienda*
" *acceperit, eaque mures roserint, ex locato te-*
" *netur, quia debuit ab hac re cavere†.*"

Whatever doubt there may be, among civilians and common-lawyers, in regard to *a casket, the contents of which are concealed from the DEPOSITARY ‡*, it seems to be generally understood, that *a common carrier* is answerable for the loss of a box or parcel, be he ever so *ignorant of its contents*, or be those contents ever so valuable, *unless* he make a *special acceptance§*: but *gross fraud and imposition* by the bailor will deprive

* 1 Wils. part 1. 281. *Dale and Hall.*

† D. 19. 2. 13. 6. ‡ Before, p. 362, 364, 366.

§ 1 Stra. 145. *Fitchburn and White.*

him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no personal communication, the bailee may be considered as a *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in *Ventris*, *Alleyne*, and *Carthew*, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish a *carrier* from other *bailees for hire**.

Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I., that a *common hoyman*, like a common *waggoner*, is responsible for goods committed to his custody, even if he be *robbed* of them†; but the reason said to have been given for this judgement, namely, because *he had his hire*, is not the true one; since, as we have before suggested, the *recompense* could only make

* Burr. 2298. *Gibben and Paynton*. See 1 Vent. 238. All. 93. Carth. 485.

† Hob. *ca.* 30. 2 Cro. 330. *Rich and Kneeland*. "The first case of the kind; said lord Holt, to be found in our books." 12 Mod. 480.

him liable for *temerity* and *imprudence*, as if a bargemaster were rashly to shoot a bridge, *when the bent of the weather is tempestuous*; but not for a *mere casualty*, as if a hoy in good condition, shooting a bridge *at a proper time*, were driven against a pier by a sudden breeze, and overfet by the violence of the shock*; nor, by parity of reason, for any other force too great to be resisted†: the *publick* employment of the *hoyman*, and that *distrust*, which an ancient writer justly calls the *finew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

All, that has just been advanced concerning a *land-carrier*, may, therefore, be applied to a *bargemaster* or *boatman*; but, 'in case of a tempest, it may sometimes happen, that the law of *jetson* and *average* may occasion a difference. *Barcroft's* case, as it is cited by chief justice ROLLE, has some appearance of hardship: "a box of *jewels* had been delivered to a ferry-man, *who knew not what it contained*, and, a sudden storm arising in the passage, he threw the box into the sea; yet it was resolved, *that he should answer for it* ‡:" now I cannot help

* 1 Stra. 128. *Anies and Stevens*.

† Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* most learnedly discussed in *Defid. Heraldi Animadv.* in *Salmasii Observ.* in *Jus Att. et Rom.* cap. xv.

‡ All. 93.

suspecting, that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough, to have been kept longer on board than other goods; for, in the case of *Gravesend* barge, cited on the bench by lord COKE, it appears, that the pack, which was thrown overboard in a tempest, and for which the bargeman was holden *not answerable*, was of great value and *great weight*; although this last circumstance be omitted by ROLLE, who says only, that the master of the vessel had *no information of its contents**.

The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a *barge-master*, there was no reason to be equally rigorous in regard to the master of a *ship*; who, if he carry goods for *profit*, must indubitably answer for the *ordinary neglect* of himself or his mariners, but ought not, they said, to be chargeable for the violence of *robbers*: it was, however, otherwise decided in the great case of *Mors* and *Slew*, where “eleven persons armed
“came on board the ship *in the river*, under
“pretence of *impressing seamen*, and forcibly
“took the chests, which the defendant had engaged to carry;” and, though the master was

* 2 Bulstr. 280. 2. Ro. Abr. 567.

entirely blameless, yet sir MATTHEW HALE and his brethren, having heard both civilians and common-lawyers, and, among them, Mr. HOLT for the plaintiff, determined, on the principles just before established, that the bailor ought to recover*. This case was frequently mentioned afterwards by lord HOLT, who said, that “the declaration was drawn by the greatest pleader “in *England* of his time†.”

Still farther: since neither the *element*, on which goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the responsibility of the bailee, one would hardly have conceived, that a diversity could have been taken between a *letter* and any other thing. Our *common* law, indeed, was acquainted with no such diversity; and a *private* post-master was precisely in the situation of another carrier; but the statute of CHARLES II. having established a *general* post-office, and taken away the liberty of sending letters by a *private* post‡, it was thought, that an alteration was made in the obligation of the post-master *general*; and, in the case of *Lane and Cotton*, three judges determined, against the fixed and well-supported opinion of chief justice HOLT, “that the post-master was *not*

* 1 Ventr. 190. 238. Raym. 220.

† Ld. Raym. 920.

‡ 12 Cha. II. ch. 35. See the subsequent statutes

“ answerable for the loss of a letter with exchequer-bills in it* :” now this was a case of *ordinary* neglect, for the bills were *stolen* out of the plaintiff’s letter *in the defendant’s office*† ; and, as the master has a great *salary* for the discharge of his trust ; as he ought clearly to answer for the acts of his clerks and agents ; as the statute, professedly enacted for *safety* as well as *dispatch*, could not have been intended to deprive the subject of any benefit, which he before enjoyed ; for these reasons, and for many others, I believe that CICERO would have said, what he wrote on a similar occasion to TREBATIUS, “ Ego tamen “ SCÆVOLÆ assentior‡.” It would, perhaps, have been different *under the statute*, if the post had been *robbed*, either by day or by night.

* Carth. 487. 12 Mod. 482.

† In addition to the authorities, before cited, p. 370. note (+), for the distinction between a loss by *stealth* and by *robbery*, see Dumoulin, tract. *De eo quod interest*, note 184. and ROSELLA CASUUM, 28. b. This last is the book, which St. German improperly calls *Summa Roselli*, and by misquoting which he misled me in the passage concerning *the fall of a house*, p. 396. The words of the author, *Trovamala*, are these : “ Domus tua minabatur ruinam ; domus corruit, et interficitequum tibi commodatum ; certè non potest dici casus fortuitus ; quia diligentissimus reparasset domum, vel ibi non habitasset ; si autem domus non minabatur ruinam, sed impetu tempestatis validè corruit, non est tibi imputandum.”

‡ Epist. ad Fam. VII. 22.

when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay, with observing, in the plain but emphatical language of St. GERMAN, “ that all the *former* diversities be
 “ granted by secondary conclusions derived upon
 “ the law of reason, *without any statute made in*
 “ *that behalf*; and, peradventure, laws and the
 “ conclusions therein be the more plain and the
 “ more open; for *if any statute were made there-*
 “ *in*, I think verily, more doubts and questions
 “ would arise *upon the statute*, than doth now,
 “ when they be only argued and judged after
 “ the *common law**.”

Before I finish the *historical* part of my essay, in which I undertook to demonstrate, “ that a
 “ perfect harmony subsisted on the interesting
 “ branch of jurisprudence in the codes of nations
 “ *most eminent for legal wisdom*†,” I cannot forbear adding a few remarks on the institutions of those nations, who are generally called *barbarous*, and who seem in many instances to have deserved that epithet: although traces of sound reasoning and solid judgement appear in most of their ordinances.

By the ancient laws of the WISIGOTHS, which are indeed rather obscure, the “keeper of

* Doct. and Stud. dial. 2. chap. 38. last sentence,

† P. 335.

“ a horse or an ox for *hire*, as well as a *hirer* for use, was obliged, if the animal *perished*, to re- turn another of equal worth:” the law of the *Baiuvarians* on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of CHARLEMAGNE and LEWIS the Pious*, where the *Mosaick* law before cited concerning a *borrower* may also be found†. In all these codes a *depository* of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by *fire*, and *his own* goods perish *not* with them; a circumstance, which some other legislators have considered as *conclusive* evidence of gross neglect or fraud: thus, by the old *British* tract, called the book of CYNWG, a person, who had been *robbed* of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods*; and it was the same, I believe, among the *Britons* in the case of a loss by *fire*, which happened without the fault of the bailee; although HOWEL the Good seems to have been rigorous in this case, for the sake of publick security‡. There was

* Lindenbrog, LL. *Wifigoth.* lib. 5. tit. 5. § 1, 2, 3. and LL. *Bairuar.* tit. 14. § 1, 2, 3, 4. *Capitul.* lib. 5. § 204.

† *Capitul.* lib. 6. § 22. Exod. xxii. 14, 15.

‡ LL. *Hywel Dda*, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See also *Stiernb.* De Jur. Sveon. p. 256, 257.

one regulation in the *northern* code, which I have not seen in that of any other nation: if precious things were deposited and *stolen*, time was given to search for the thief, and, if he could not be found within the time limited, a *moiety* of the value was to be paid by the depositary to the owner, “*ut damnum ex medio uterque sustineret**.”

Now I can scarce persuade myself, that the phrase used in these laws, *si id perierit*, extends to a perishing by *inevitable accident*; nor can I think, that the old *Gotbick* law, cited by STIERN-HOOK, fully proves his assertion, that “a depositary was responsible for *irresistible force* ;” but I observe, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more strict than the *Romans* in the duties, by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states, and those of a people, who could suffer disputes concerning bailments to be decided by *combat*; for it was the Emperor FREDERICK II., who abolished the trial by battle in cases of contested deposits, and substituted a more rational mode of proof†.

* LL. *Wifgoth*, lib. 5. tit. 5. § 3.

† LL. *Longobard*, lib. 2. tit. 55. § 35. *Constit. Neapol.* lib. 2. tit. 34.

I purposely reserved to the last the mention of the HINDU, or *Indian* code, which the learning and industry of my much-esteemed friend Mr. HALHED has made accessible to *Europeans*, and the PERSIAN translation of which I have had the pleasure of seeing: these laws, which must *in all times* be a singular object of curiosity, are *now* of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a *British* power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution; and, although the rules of the *Pundits* concerning *succession to property*, the *punishment of offences*, and the *ceremonies of religion*, are widely different from ours, yet, in the great system of *contracts* and the common intercourse between man and man, the *Pootree* of the *Indians* and the *Digest* of the *Romans* are by no means dissimilar*.

* "Hæc omnia, says GROTIUS, *Romanis* quidem congruunt legibus, sed non ex illis primitus, sed ex *equitate naturalis*, veniunt: quare eadem apud alias quoque gentes reperire est." De Jure Belli ac Pacis, lib. 2. cap. 12. § 13.

Thus, it is ordained by the sages of *Hindustán*, that “ a depositor shall carefully inquire into
 “ the character of his intended depositary; who,
 “ if he undertake to keep the goods, shall pre-
 “ serve them with *care* and *attention*; but shall
 “ not be bound to restore the value of them, if
 “ they be *spoiled by unforeseen accident*, or *burned*,
 “ or *stolen*; UNLESS he *conceal* any part of them,
 “ that has been saved, or unless *his own effects*
 “ *be secured*, or unless the accident happen after
 “ his *refusal* to redeliver the goods on a de-
 “ mand made by the depositor, or while the de-
 “ positary, against the nature of the trust, pre-
 “ sumes to *make use* of them :” in other words,
 “ the bailee is made answerable for *fraud*, or
 “ for *such negligence* as approaches to it*.

So, a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing, after the completion of the business, for which he borrowed it; but not, if it be *accidentally* lost or *forcibly* seized, *before* the expiration of the time, or the conclusion of the affair, for which it was lent† : in another place, it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall nevertheless recover his debt with interest, but the

* *Gentoo Laws*, chap. IV. See before, p. 373.

† Same chapter. See before, p. 397.

debtor shall not be entitled to the value of his pawn*; and that, if the pledgee *use* the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it†.

In the same manner, if a person *bire* a thing *for use*, or if any *metal* be delivered to a *workman*, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work‡.

All these provisions are consonant to the principles established in this essay; and I cannot help thinking, that a clear and concise treatise, written in the *Persian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Asiatick* and *European* systems, would contribute, as much as any regulation whatever, to bring our *English* law into good odour among those, whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

* Chap. I. Sect. I. Before, p. 415. 416.

† Chap. I. Sect. II. Before, p. 409.

‡ Chap. IV. and Chap. X. Before, p. 418, 421.

Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law*; on the subject of BAILMENTS, *which have been traced by a short analysis*, are recognised and confirmed by the wisdom of nations*; and I hasten to the third, or *synthetical*, part of my work, in which, from the nature of it, most of the *definitions* and *rules*, already given, must be repeated with little variation in *form*, and none in *substance*: it was at first my design, to subjoin, with a few alterations, the *Synopsis* of DELRIO; but finding, that, as BYNKERSHOEK expresses himself with an honest pride, *I had leisure sometimes to write, but never to copy*, and thinking it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method, which logicians call *Synthesis*, and in which all sciences ought to be explained.

I. To begin then with *definitions*: 1. BAILMENT is a *delivery of goods in trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use, for which they were bailed, shall have elapsed or be performed.*

2. DEPOSIT is a *bailment of goods to be kept for the bailor without a recompense.*

* Before, p. 328 and 337.

3. **MANDATE** is a *bailment* of goods, *without reward*, to be *carried from place to place*, or to have some act performed about them.

4. **LENDING FOR USE** is a *bailment of a thing* for a certain time to be used by the borrower *without paying for it*.

5. **PLEDGING** is a *bailment* of goods by a debtor to his creditor to be kept till the debt be discharged.

6. **LETTING TO HIRE** is 1. a *bailment of A THING* to be used by the hirer for a compensation in money; or, 2. a *letting out of WORK and LABOUR* to be done, or *CARE and ATTENTION* to be bestowed, by the bailee, on the goods bailed, and that for a *pecuniary recompense*; or, 3. of *CARE and PAINS* in carrying the things delivered from one place to another for a stipulated or implied reward.

7. **INNOMINATE BAILMENTS** are those, where the compensation for the use of a thing, or for labour and attention, is not pecuniary, but either 1. the reciprocal use or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of another thing in consideration of care and labour, and conversely.

8. **ORDINARY neglect** is the omission of that care, which every man of common prudence, and

capable of governing a family, takes of his own concerns.

9. **GROSS neglect** is the *want* of that care, which *every man of common sense, how inattentive soever*, takes of *his own* property.

10. **SLIGHT neglect** is the *omission* of that *diligence*, which *very circumspect and thoughtful persons* use in *securing their own* goods and chattels.

11. **A NAKED CONTRACT** is a contract made without *consideration* or *recompense*.

12. The *rules*, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these :

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for **GROSS neglect**.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for **SLIGHT neglect**.

3. When the bailment is *beneficial* to *both* parties, the bailee must answer for **ORDINARY neglect**.

4. **A SPECIAL AGREEMENT** of any bailee to answer for *more* or *less*, is in general valid.

5. **ALL** bailees are answerable for actual **FRAUD**, even *though the contrary be stipulated*.

6. No bailee shall be charged for a loss by

inevitable ACCIDENT or irresistible FORCE, except by special agreement.

7. ROBBERY by *force* is considered as *irresistible*; but a loss by *private STEALTH* is *presumptive* evidence of *ordinary* neglect.

8. GROSS neglect is a *violation of good faith*.

9. No ACTION lies to compel performance of a *naked contract*.

10. A reparation may be obtained by suit for every DAMAGE occasioned by an INJURY.

11. The negligence of a SERVANT, acting by *his master's express or implied order*, is the negligence of the MASTER.

III. From these *rules* the following *propositions* are evidently deducible :

1. A DEPOSITARY is responsible only for GROSS neglect; or, in other words, for a *violation of good faith*.

2. A DEPOSITARY, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own goods*, and *they also* be spoiled or destroyed.

3. A MANDATARY to *carry* is responsible only for GROSS neglect, or a *breach of good faith*.

4. A MANDATARY to *perform a work* is bound to use a *degree of diligence adequate to the performance of it*.

5. A man cannot be compelled by ACTION

to perform his promise of engaging in a DEPOSIT or a MANDATE.

6. A reparation may be obtained by suit for DAMAGE occasioned by the *nonperformance* of a promise to become a DEPOSITARY or a MANDATARY.

7. A BORROWER FOR USE is responsible for SLIGHT negligence.

8. A PAWNEE is answerable for ORDINARY neglect.

9. The HIRER of a THING is answerable for ORDINARY neglect.

10. A WORKMAN for HIRE must answer for ORDINARY neglect of the goods bailed, and apply a *degree of SKILL equal to his undertaking*.

11. A LETTER to HIRE of his CARE and ATTENTION is responsible for ORDINARY negligence.

12. A CARRIER for HIRE, by *land* or by *water*, is answerable for ORDINARY neglect.

IV. To these *rules* and *propositions* there are some *exceptions* :

1. A man, who *spontaneously* and *officially* engages to *keep*, or to *carry*, the goods of another, though *without reward*, must answer for SLIGHT neglect.

2. If a man, through *strong persuasion* and with *reluctance*, undertake the execution of a

MANDATE, no more can be required of him than *a fair exertion of his ability*.

3. ALL bailees become responsible for losses by CASUALTY OR VIOLENCE, *after their refusal* to return the things bailed on a LAWFUL DEMAND.

4. A BORROWER and a HIRER are answerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are answerable in ALL EVENTS, if they *use* the things deposited or pawned.

6. An INNKEEPER is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

7. A COMMON CARRIER, by *land* or by *water*, must indemnify the owner of the goods carried, if he be **ROBBED** of them.

V. It is *no* exception, but a *corollary*, from the *rules*, that “ every bailee is responsible for a
“ loss by ACCIDENT OR FORCE, however *inevi-*
“ *table* or *irresistible*, if it be *occasioned* by that
“ *degree of negligence*, for which the nature of
“ his contract makes him generally answer-
“ ble;” and I may here conclude my discussion of this important title in jurisprudence with a general and obvious *remark*; that “ *all* the pre-

“ceding rules and propositions may be diversified to *infinity* by the *circumstances* of every particular case ;” on which circumstances it is on the *continent* the province of a *judge* appointed by the sovereign, and in ENGLAND, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide : thus, when a painted *cartoon*, pasted on canvas, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question “whether the depository had been guilty of GROSS neglect,” was properly left to the jury, and, on a verdict for the plaintiff, with pretty large damages, the court refused to grant a new trial* ; but it was the judge, who determined, that the defendant was by *law* responsible for *gross* negligence *only* ; and, if it had been proved, that the bailee had kept *his own* pictures of *the same sort* in the same place and manner, and that *they too* had been spoiled, a new trial would, I conceive, have been granted ; and so, if no more than *slight* neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide against law, that a bailee *without reward* was responsible for it.

Should the *method* used in this little tract be approved, I may possibly not want inclination,

* 2 Stra. 1099. *Mytton and Cook*

if I do not want leisure, to discuss in the same form *every* branch of *English* law, *civil* and *criminal*, *private* and *publick*; after which it will be easy to separate and mould into distinct works, the three principal divisions, or the *analytical*, the *historical*, and the *syntbetical*, parts.

The great system of jurisprudence, like that of the Universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility: if LAW be a *science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but, if it be *merely* an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer, who has the strongest habitual, or artificial, *memory*. In practice, law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to

yield, if not from a becoming modesty, at least from a just attention to that object, for which all laws are framed, and all societies instituted,
THE GOOD OF MANKIND.

ADVERTISEMENT

AFTER I had finished the preceding tract, to the satisfaction of several friends, but not to my own, I was informed, that the learned CHRISTIAN THOMASIVS had published a dissertation on the same subject with the following title: *De Usu Practico Doctrinæ difficillimæ Juris Romani de Culparum Præstatione in Contractibus*; HALÆ, MDCCV. The fame of the author, and the high applause, which the very sensible *Bynkershoek* bestows on him, impressed me with a most favourable idea of his work, and with a strong desire to procure it; but, to my extreme disappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Universities: I have sent for it, however, to *Germany*, and, when I receive it, shall take a sincere pleasure, either in correcting such errors, as it may enable me to detect in my essay, or in confirming the system, which I have adopted, by so respectable an authority.

THE CASES.

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AN INQUIRY
INTO
THE LEGAL MODE
OF
SUPPRESSING RIOTS,
WITH
A CONSTITUTIONAL PLAN
OF
FUTURE DEFENCE.

Res videas quo modo se habeant : orbem terrarum, imperiis
distributis, ardere bello ; urbem sine legibus, sine judiciis,
sine jure, sine fide, relictam direptioni et incendiis.

C I C. Epist. ad Fam. 4. 1.

AN INQUIRY
INTO
THE LEGAL MODE
OF
SUPPRESSING RIOTS.

IT has long been my opinion, that, in times of national adversity, those citizens are entitled to the highest praise, who, by personal exertions and active valour, promote at their private hazard the general welfare; that the second rank in the scale of honour is due to those, who, in the great council of the nation, or in other assemblies, legally convened, propose and enforce with manly eloquence what they conceive to be salutary or expedient on the occasion; and that the third place remains for those persons, who, when they have neither a necessity to act, nor a fair opportunity to speak, impart in writing to their countrymen such opinions as their reason approves, and such knowledge as their painful researches have enabled them to acquire.

With these restrictions, the sword, the tongue, and the pen, which have too often been employed by the worst passions to the worst purposes, may become the instruments of exalted virtue ; instruments, which it is not the right only, but the duty, of every man to use, who can use them ; paying always a sacred regard to the laws of that country, which he undertakes to defend, to advise, or to enlighten.

A sense of this duty and a consciousness of this right have impelled me, with no views, as it will be readily believed, of ambition or interest, much less from any factious motive, to take up that instrument, which I have stated as the least honourable of the three, and to present the publick with a few considerations on a subject no less interesting at the present hour than important to all future ages.

Having unhappily been a vigilant and indignant spectator of the late abominable enormities ; having seen the senate besieged, and the senators insulted ; the laws of our country defied, and the law of nations violated ; having beheld the houses of our truest patriots and most respectable magistrates either destroyed, assailed, or menaced ; having passed a whole night encircled by the blazing habitations of unoffending individuals, and by the flames of those edifices which publick justice had allotted to various classes of of-

fenders ; having lamented over a great metropolis exposed for many days to the fury of a licentious rabble ; having believed the noblest commercial City in the world to be in danger of a second conflagration ; having in vain sought access to the courts at Westminster in full term, and to the houses of parliament in full session ; having, in a word, been witness to horrors, all the concurrent causes of which are not easy to be known, and all the consequences of which are less easy to be predicted ; I could not but see at length, with a mixed sensation, between anguish and joy, the vigorous and triumphant exertions of the executive power ; and I admitted the necessity of those exertions, whilst I deplored it.

Every well-disposed man, and lover of tranquillity, must have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repose ; that the valuable effects, which many had removed, and some had even buried, might be replaced ; that the artisan might resume his implements, and the student, his books ; that justice had reascended her seat ; and that order was succeeding to confusion, harmony to discord ; but every honest man and lover of his country must have grieved, that a whole week was then before us, in which the necessary adjournment of the Commons, who would otherwise have been deliberating on

the state of the metropolis and the kingdom, had left us under a power, which, whatever it might be in form and in effect, was in truth and substance, dictatorial.

In this awful interval a question occurred to me, which must naturally have presented itself to many others: "Whether the still-subsisting laws and genuine constitution of ENGLAND had not armed the *civil state* with a power sufficient, if it had been previously understood and prepared, to have suppressed ever so formidable a riot without the intervention of the *military*."

If no such power legally existed in the state, our system, I thought, must be defective in a most essential point; since no people can be really and substantially free, whose freedom is so *precarious*, in the true sense of the word, as to depend on the protection of the soldiery; and even our protectors, who for several days possibly could not, but certainly did not, act at all, might have been necessarily called away, in the most dangerous moment, to defend our coasts and maritime towns: if, on the other hand, such a power of self-protection did exist, our laws, I concluded, must have been disgracefully neglected, and ought to be restored to full vigour and energy.

A very short inquiry enabled me to answer

the question, at least to my own satisfaction, *in the affirmative*; and it is the result of this inquiry, which I now request the public to accept with the indulgence due to an occasional production, and with the attention due to a subject of general importance.

This then is the proposition, which I undertake to demonstrate: “ That the common, and
“ statute, laws of the realm, in force at this day,
“ give the *civil* state in every county a power,
“ which, if it were perfectly understood and
“ continually prepared, would effectually quell
“ any riot or insurrection, without assistance from
“ the *military*, and even without the modern
“ riot-act.”

To this proposition I shall strictly, and, as far as I am able, logically confine myself; avoiding all parade of legal or antiquarian learning, and omitting all such disquisitions as might answer the purpose of ostentation, which I disdain, but not of utility, which alone I seek: should the curious and intelligent reader be desirous of investigating the powers of magistrates and of courts in recording riots and punishing rioters, and of tracing the history of our ancient and modern laws for the preservation of public tranquillity, from that of king INA to that of GEORGE the First, he will receive ample information from the various books of authority, which I shall

have occasion to cite in the course of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the sheriff of the county is not only authorized but commanded to raise the *Posse Comitatus*, and forcibly to suppress the tumult; but, if most of those, who use this expression, will examine their own minds they will presently perceive, that they utter words, which convey to them no distinct idea, and that the *power of the county*, like many other *powers* in nature and jurisprudence, is very ill ascertained, and very imperfectly comprehended. Logicians give us an admirable rule, "*that we should seek after a clear, precise and complete conception of things, as they really exist in their own nature and in all their parts, and should not always imagine that there are ideas, because there are words**:" let us apply this rule to the case before us, and endeavour to form a luminous, fixed, comprehensive notion of the *power* in question; without supposing that we comprehend it, merely because we know, that, besides its *Latin* name, it is called in Norman French, *Poiar del Countee*, and sometimes, *Aide del paist†*.

We cannot begin our investigation under a

more certain or more respectable guide, than Chief Justice FINEUX, whose words I shall transcribe from that most venerable repository of genuine *English* wisdom, the Year books*: “At the beginning,” says that learned Judge, “all the administration of justice was in one hand, namely, in the Crown; then, after the multiplication of the people, that administration was distributed into counties, and the power was committed to a deputy in each county, namely, the Viscount, or Sheriff; who was the King’s deputy to preserve the peace; and thus it is, that all people must, in obedience to him, be *ready* in defence of the realm, when enemies come: thus too was he assigned to be a conservator of the peace, to punish malefactors, to defend the realm when enemies invade it, to be attendant on the King in war-time, and to cause all people in his county to go with the King to defend the land against enemies.”

Who the people are, that the laws of England required, and still require, to be *ready* and obedient to the sheriff on all occasions of publick disturbance, we learn from the judicious antiquary, LAMBARD, who cites and adopts the opinion of Mr. Marrow delivered in a work,

* 12. Hen. VII. 17.

which I suppose to have been a reading on the statute 13 Hen. IV. His opinion was, “that the
 “justices of the peace, sheriff or under sheriff,
 “ought to have the aid and assistance of all
 “knights, gentlemen, yeomen, labourers, ser-
 “vants, apprentices, and likewise of wards, and
 “of other young men above the age of fifteen
 “years; because all of that age are bound to
 “have *barnefs*, or armour, by the statute of
 “Winchester*.’.

What effect the subsequent repeal of the statutes of armour might have on the reason assigned by Mr. *Marrow* for his opinion, it is needless to inquire; for it seems obvious, that the statutes of JAMES I. removed the *necessity* only, and not the *propriety*, of having arms, or, to use the very words of the old act, *armure pur la pees garder*; and the doctrine in *Lambard* is generally understood to be law†. The passage above-cited appears, however, to have misled the great commentator on the laws of England, who seems to have collected from it, that none were bound to obey the summons of the sheriff, but persons *under the degree of nobility*‡; whereas the patent of assistance, cited by *Dalton*||, commands barons, earls, and dukes, to be *auxiliantes et re-*

* Lamb. Eiren. 316.

† Dalt. c. 95.

‡ 1 Comm. 344. 4 Comm. 122.

|| C. 1.

spondentes to the sheriff in all things belonging to his office.

The power of the county, therefore, includes the whole *civil* state, from the duke to the peasant; while the *military* state, *as such*, forms no part of that power, being under a different command, and subject to a different law; but, as every foldier in England is at the same time a citizen, he is authorized and perhaps bound, when under no particular orders or at no particular station, to exert himself, like any other good subject, in the suppression of tumults. the prevention of felony, and the apprehension of the rioters or felons. This I mean: when the soldiery, not being upon military duty, happen to be present at a riot, and in their civil capacity forcibly suppress it, their act is not only legal but laudable; and the colour of their clothes, or the nature of their arms, make no kind of difference; but, when they are *in truth* called out by the executive magistrate, and are *in fact* no more than instruments in the hands of their commanders, their acts can only be justified by that NECESSITY which always *defends what it compels*, which for the time supersedes all positive law, but of the real existence of which their country must afterwards judge, unless the legislature should, in their wisdom, be pleased to declare it. For this distinction I can produce no written au-

thority; but it seems consonant to reason as well as truth.

This power of the county. of which we may now begin to form a distinct idea, is mentioned, as well known and well understood, in a variety of statutes which were confirmatory of the common law; and some parts of which I shall cite in the original languages, how barbarous or inelegant soever they may appear to a classical eye.

The stat. Westm. 1. c. 17. ordains “*qe le vis-*
 “*counte ou le bailiff, prise ove luy poyer de son*
 “*countee, ou de sa baille, voit essayer de faire le*
 “*plevin des averes a celui qe prit les averes.*”
 And that of Westm. 2. c. 39. is more peremp-
 tory in cases of resistance to the execution of
 civil process: “*Multoties etiam dant responsum,*
 “*quod non potuerunt prosequi præceptum regis*
 “*propter resistantiam potestatis alicujus magna-*
 “*tis, de quo caveant vicecomites de cætero, quia*
 “*hujusmodi responsio multum redundat in de-*
 “*decus domini regis; et, quam citò ballivi sui*
 “*testificantur, quòd invenerunt hujusmodi re-*
 “*sistentiam, statim omnibus omisissis, assumpto*
 “*secum posse comitatús sui, eant in propriâ per-*
 “*sonâ ad faciendam executionem.*” By the 17
 Rich. II. c. 8. it is enacted, that, in case of any
 tumult or disorder, “*a plus tost qe viscontz*
 “*et autres ministres le roi poent ent avoir*

“ coniffance, ove *la force del countee et pais*, ou
 “ tiel cas aviegne, ilz mettent destourbance en-
 “ contre tiel malice *ove tout lour poair*, et
 “ preignent tielx meffefours, et les mettent en
 “ prifone tanqe due execution de leie foit fait
 “ de eux, et qe touz feignurs et autres liges du
 “ roialme foient entendantz et aidantz, *de tout*
 “ *lour force et poair*, as viscontz et ministres avant
 “ ditz.”

Again: by the 13 Hen. IV. c. 7. “ Ordeig-
 “ nez est et establiz, qe, si aucun riot assemblee
 “ ou rout des gentz encontre la loie se face en
 “ aucune partie del roialme, les justices de paix,
 “ trois ou deux de eux a meyns, et le viscont
 “ ou south viscont del countee, ou tiel riot assem-
 “ blee ou rout se ferra enapres, *veignent ove le*
 “ *poair del countee*, si besoigne ferra, pur eux
 “ arester, et eux arestent.” In the construction
 of this last statute it has been holden*, that, al-
 though it speak of *three* or *two* justices at least,
 yet *one* justice may raise the power and suppress
 a riot; for *it is a beneficial law*, said FINEUX, and
was enacted for the prevention of mischief, which
might ensue, if a justice were to wait for others.
 It has also been adjudged, that, under the word
ministers, in the stat. 17 Rich. II. c. 8. justices
 of peace are comprised †; and so are *constables*,

* 14 Hen. VII. 10. Crompt. 46. b. † Crompt. 46. a.

by the opinion of *Fitzherbert* cited by *Crompton*, and confirmed by the Year book 1 Hen. VII. 10; where it is laid down, that “constabularii villæ super affraiam possunt levare populum.”

We may therefore conclude, that, in all cases of tumult and insurrection, the sheriff, or other *minister*, may and ought to make *proclamation*, commanding all such persons, as constitute the power of the county, to assemble and assist him*; or he may send a particular *warning* or *summons*, for the same purpose, to every individual of the *posse*, who must attend such summons under pain of a heavy fine and imprisonment; for, by the stat. 2 Hen. V. c. 8. it is provided, “que les lieges du roi esteantz sufficeantz pur tra-
 “vailler en le countee, ou tielx routes assemblez
 “ou riotes sont, soient assistantz as justices, com-
 “missioners, viscont, et soutez-viscont, de mesme
 “le countee, *quant ilz ferront raisonablement*
 “*garniz*, pur chivacher, ove les ditz justices,
 “commissioners, et viscont ou soutez-viscont en
 “aide de resistance de tielx riotes routes et as-
 “semblez sur peine demprisonement et faire fyn
 “et ranceon al roi:” And the offence of neglecting to join the power of the county, after such reasonable warning, is ranked by Sir *William*

* Dalt. c. 95.

Blackstone under the class of *contempts against the king's prerogative**.

Having fixed our ideas concerning the nature of this legal power, the mode of raising it, and the punishment of a criminal neglect to join it, let us consider, first, by the help of reason only, what corollaries necessarily follow the doctrine, which we have expounded; and, next, inquire whether authority and reason, which lord *Coke* justly calls *the two faithful witnesses in matter of law*†, coincide on the question before us; as they indubitably will, unless either our previous ratiocination be illogical, or the minds of ancient and modern lawyers have taken a bent from the prejudices of their respective ages.

From the obligation of the sheriff, or other minister, to assemble the power of his county for the suppression of any rebellion, insurrection, riot, or affray, and for the repelling of invading enemies; from the duty incumbent on every man of sufficient years and strength to associate himself with the power so assembled, and from the principles of natural justice, which will neither *require men to do impossible things*, nor *refuse them the means of performing what they are commanded to perform*; from these obligations and these principles it instantaneously follows: First;

* 4 Com. 122.

† 1 Inst. Pref.

That the sheriff or other peace-officer is bound to raise *such* a power as will effectually quell the tumult either really existing or justly feared.

Secondly; That the power so raised may and must be armed with such *weapons*, and act in such *order*, as shall enable them totally to suppress the riot or insurrection, or to repel the invaders.

Thirdly; That, in the use of such weapons, the power may justify the *charging*, *wounding*, or even *killing*, the rioters or insurgents, who persist in their outrages, and refuse to surrender themselves.

Fourthly; That the power of every county ought at all times, but especially in times of danger, to be *prepared* for attending the magistrate, and to know the *use* of such weapons, as are best adapted to the suppression of tumults.

Fifthly; That, since the *musket* and *bayonet* are found by experience to be the most effectual arms, all persons, who constitute the power of a county, are bound to be competently skilled in the use of them.

Sixthly; That, since the only safe and certain mode of using them with effect is by acting *in a body*, it is the duty of the whole civil state to know the platoon-exercise, and to learn it in companies.

As *no authority*, according to CHARRON, *can stand without reason*, so we find, by constant experience, that no reason can surmount the passions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in support of the foregoing propositions: first, therefore, I shall prove them by citing cases, which have been solemnly adjudged, together with the opinions of learned lawyers, whose works are much respected in our courts of justice; and, next, I shall inquire, whether those cases and opinions have been over-ruled or shaken by any subsequent decisions, or acts of the legislature.

The earliest resolution upon the subject, that has occurred to me, was in a case, which the very learned and judicious *Brook* thought *worthy of note** in his time, and which, in the present time, deserves peculiar attention. It is reported in *French* in the first page of the Year book 3 Hen. VII. and it is manifestly the same with that afterwards abridged in an imperfect *Latin* note printed, out of its place, in the tenth page of the same book; though *Brook* seems to have considered them as different, or rather not to have observed their identity; for, in the title of his *Abridgement* just alluded to, he gives them

* Bro. Abr. tit. Office et Officer. 23.

in separate articles, without melting both parts of the Year book together, as I propose to do; by which means I shall extract the whole case and form one consistent state of it.

JOHN DEINS had been outlawed in the county of *Suffolk* for felony; and, having brought a writ of error to reverse the outlawry, had obtained a *Non Molestando*, which he delivered to the escheator, *John Lentborp*; who, nevertheless, seized and took away his effects. Upon this, Deins replevied; and EDMUND BEDINGFIELD, the sheriff, issued his precept to Thomas Gire, his bailiff, *jurus et conus*, together with *Roger Hopton, Edmund Heningham*, and three other persons, directing them to take the goods of the plaintiff out of the escheator's possession: accordingly, the bailiff and his party took forcibly from *Lentborp* an hundred sheep, which they delivered to *Deins*; and, in order to make delivery of the goods and cattle which remained, they assembled all the inhabitants of five adjacent villis; who, in number *three hundred*, arrayed in a warlike manner, and armed with brigandines, jackets of mail, and GUNS, united and associated themselves, and marched* to the place where the cattle were detained; but did not proceed to any other act of violence.

* *Modo guerrino arraiati se univerunt et associaverunt, et iter suum arripuerunt*, 3 Hen. VII. 1. 10.

For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench against the plaintiff in replevin, the sheriff and his bailiff, and the persons who had assisted them; but the court unanimously adjudged, that the indictment was void; founding their judgement, as it seems, on the reasons advanced by serjeant *Keble*, whose argument it may be proper to state at large.

“ As to the plaintiff in replevin, said he, no
“ wrong was committed by him; for the eschea-
“ tor, when he took the goods, after the *Non*
“ *Molestando* had been delivered to him, acted
“ unlike an officer; since it was his duty, in that
“ instant, to surcease his process: *Deins*, there-
“ fore, was perfectly justified in complaining to
“ the sheriff, and must consequently be dis-
“ charged from this indictment.

“ Nor did the sheriff transgress his duty in exe-
“ cuting the replevin; for, when the party came
“ to him, he could not know, whether he was an
“ outlaw or not; or whether or no the escheator
“ had seised the cattle in the King's right; which
“ ought to have been shown by the King's offi-
“ cer. The bailiff too must be discharged; for
“ the servant is in the same condition with the
“ master; and, as the sheriff cannot do every
“ thing himself, his deputy must have the same
“ power with him.

“ In regard to his assembling three hundred
 “ men, *that was no illegal act**; for every man is
 “ bound to assist the sheriff and his bailiff; to
 “ support him in executing the King’s writs;
 “ and to give him aid in all cases of need; *and*
 “ *this by common law and common reason*, not-
 “ withstanding the statutes of Westminster the
 “ first and second. So, if *any man* refuse to as-
 “ sist the sheriff at his *request*, he shall be fined,
 “ whether it be to execute process, or to appre-
 “ hend felons.”

The Court agreed, that the bailiff had as good a right to raise the power as the sheriff himself; because it is all one office and one authority.

It was urged, “ that, if men assemble with
 “ arms and *do nothing*, it shall be intended, that
 “ they assembled with a bad design;” but it was answered, that in some cases the presumption might be just; in others, not: thus the use of armour on particular occasions, as on Midsummer eve in London, and at other times for sport, is not punishable; and, here, the cause of the assembly appears, *namely to execute a replevin*. Even if they had acted, yet their assembly was lawful in the beginning; and such assemblies are not illegal as are not *to the terror of the people of*

Ceo nest incontre la ley: So Brook reports his words, *tit. Riots, 2.*

our lord the king; which words ought to be in every indictment for an unlawful assembly.

Another point was touched upon by the king's serjeants: "that the sheriff cannot take with him *so many* armed men, but only a *reasonable* party;" to which it was answered, that, if he were so restrained, he might be in great jeopardy and peril of his life; and for this reason, *he may take as many as he pleases at his own discretion.*

Lastly, it was argued on the statute of Westm. 2. c. 39*, that the sheriff might raise the power of his county *after complaint made*, and *not before*; but the judges held, that he might raise it before *by the common law.*

This case (which, for convenience in citation, I shall call *Bedingfield's Case*), is irresistibly strong in support of my *first* and *second* corollaries; for, although there seems to have been some doubt at first in the minds of the judges, as it was merely the execution of *civil process*, yet, if the armed men had marched in array for the purpose of *apprehending felons*, there would have been no debate on the legality of the act; and, after an argument at the bar, the former doubt was entirely removed.

* The statute of *Marlbridge*, c. 21. seems here to be meant; the words *post querimoniam factam* not being used in stat. Westm. 2.

The next is the case of a riot at *Drayton Bassett* in *Staffordshire*, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by *Crompton**; who says that the court resolved, 1. That, if the two justices, nearest to the place where the riot is committed, do not act as they are required by stat. 13 Hen. IV. c. 17. each of them shall pay an *hundred* pounds; and the other justices of the same county, where the tumult was, shall be fined for not suppressing it, *if there was any default in them*. 2. That the sheriff and justices of peace may take as many men in armour as are necessary, WITH GUNS, and so forth, and *kill the rioters*, if they will not yield themselves; for the stat. 13 Hen. IV. c. 17. says, that they *MUST arrest them*; and, if the justices, or any of their company, kill any of the rioters, who will not surrender themselves, it is no offence in them.

This case of *Drayton Bassett*, which is also cited and approved by *Sir Matthew Hale*†, incontestably demonstrates my *third* corollary.

In the 34th or 43d of Elizabeth (for the date is differently reported by some transposition of the figures) the doctrine in *Bedingfield's* case

* Crompt. 46. b. 124. b.

† 1 H. P. C. 495.

was fully recognized and established by the decision in the case of *St. John**, or *Gardener*†; which, being subsequent to the stat. 33 Hen. VIII. c. 6. prohibiting the use of *band-guns*, clearly shows, that no alteration in the ancient law was made by that prohibition.

The case was this: *Gardener* had obtained a judgement against *St. John*, and procured a writ of execution directed to the sheriff of *Bedford*, who made a warrant to *Gardener's* own brother as a special bailiff; but, resistance being justly feared, the bailiff armed himself with a *dagge*, or short gun. It happened that *St. John* was a justice of peace for *Bedfordshire*, and seems to have had that *little learning*, which, in law rather more than in poetry, is a *dangerous thing*, especially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him seized by his servants, and brought before himself as the *next* justice; when, by colour of his office and the statute of Henry VIII. he committed the officer, who came to arrest him, until he should pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himself by *habeas corpus*, and the whole matter being disclosed to the court, it was resolved, “ that the sheriff or any of his mi-

* 5. Rep. 71. 72.

† Cro. Eliz. 821, 822.

“ nisters, in execution of justice, may carry
 “ *dagges or band-guns*, or other weapons inva-
 “ sive or defensive, the same not being restrained
 “ by the general prohibition of the statute ; for,
 “ if it were, *no justice would be administered.*”

By stronger reason such weapons may be carried for the purpose of suppressing riots, apprehending felons, or repelling invaders. It may here be observed, that the statute of Hen. VIII. was enacted for the prevention of mischief, that might be occasioned by the use of *little band-guns*, which might be carried secretly and kill on a sudden ; but guns of a proper length were not prohibited.

The *Case of Arms*, or BURTON's case, next presents itself to our examination : it is of very high authority, and so apposite to the object of our inquiry, that I shall make no apology for citing it in the very words of the learned reporter* : “ Upon an assembly of *all the justices*
 “ *and barons* at Serjeant's Inn this Easter term
 “ (39 Eliz.), on Monday the 15th of April, this
 “ question was moved by *Anderson*, Chief Jus-
 “ tice of the Common Bench ; *Whether men may*
 “ *arm themselves to suppress riots and rebellions,*
 “ *or to resist enemies, and endeavour of themselves*
 “ *to suppress or resist such disturbers of the peace*
 “ *and quiet of the realm ;* and, upon good deli-

* Poph. 121, 122.

“beration, it was resolved *by them all*, that every
 “justice of peace, sheriff, and other minister, or
 “OTHER SUBJECT OF THE KING, where such
 “accident happens, *may do it*; and, to fortify
 “this their resolution, they perused the statute of
 “Northampton, 2 Edw. III. c. 3. which enacts,
 “that *none be so hardy as to come before the king’s*
 “*justices or other ministers of the king in the ex-*
 “*ecution of their office with force and arms, nor to*
 “*bring force in affray of the peace, or to ride or go*
 “*armed by night or day, EXCEPT the servants of*
 “*the king in his presence, or the ministers of the*
 “*king in the execution of his precepts, or of their*
 “*office, and those who are in their company assist-*
 “*ing them,* OR UPON CRY MADE FOR WEA-
 “PONS TO KEEP THE PEACE, *and this in*
 “*places where accidents happen, upon the pe-*
 “*nalty in the same statute contained;* where-
 “by it appeareth, that, *upon cry made for wea-*
 “*pons to keep the peace, EVERY MAN,* where
 “such accidents happen, for breaking the peace,
 “*may by law arm himself against such evil-doers;*
 “but they took it to be *the more discrete way* for
 “every one in such a case to be assistant to the
 “justices, sheriffs, or other ministers of the king
 “in the doing of it.”

Highly as the authority of Sir *John Popbam*
 deserves to be respected, it is to be wished, that
 Lord *Anderson* himself had given us a full account

of his own opinion with that of the other judges ; but he has left us no more than a short note* to the same effect with the preceding report. This case also is cited by *Hale*†, and the very words in Popham are transcribed by Sir *John Kelyng* in his report of *Lymerick's* case‡. I think it a strong proof of my *fourth* corollary, respecting the necessity of being *prepared* at all times to keep the peace ; but, if a particle of doubt on that head can remain, it will be dissipated at once by the statute of Westm. 1. c. 9. by which, as it is cited by Crompton§, “ *purveu est, qe touz continuallyment soient prestez et appareillez al maundement et al somons des viscountes, et al crye del pais de fuire et darester felons, qant mestier serra, auxibien dedeins fraunchises come dehors ; et ceux, qe ceo ne ferront, et de ceo soient atteintz, le roi prendra a eux grave-ment ;*” whence it should seem, that ALL SUBJECTS, who are not *continually prest*, or *ready*, for the orders of the sheriff on an alarm in the country, are exposed to the royal displeasure and to a severe penalty ; and the word *prest* (which in modern times has been either ignorantly or intentionally confounded with the participle passive of the verb *to press*) is used for *prepared* by Chief Justice FINIEUX in a passage before cited :

* 2 And. 67. † 1 H. P. C. 53. ‡ Kel. 76. § 124. 2.

I am aware, however, that *communalment* is the usual reading; which will give a sense rather less forcible, “that all men *generally* shall be “ready and accoutred *at* the summons of the “sheriff;” but this amounts to the same thing; for how can a man be armed and apparelled *in an instant on a sudden alarm*, unless his weapons and accoutrements were previously at hand?

The opinions of the learned, which form the second branch of my proofs, can add little weight to *four* cases of such authority, as those of *Bedingfield*, *Drayton Bassett*, *St. John*, and the *Case of Arms*: indeed, these cases seem to have been the guides of *Lambard* and *Dalton*, *Hale* and *Hawkins*; who all agree, that “it is referred to “the discretion of the sheriff, under-sheriff, or “other person authorized to raise the *posse*, how “many men they will assemble, and how they “shall be armed, weaponed, or otherwise furnished “for the business*,” that “private persons may “arm themselves in order to suppress a riot, and “that all, who attend the justices in order to “quell a tumult, may take with them *such weapons as shall enable them to do it effectually*†; “that, lastly, in executing process or apprehending rioters, they may, by the common law,

* Lamb. Eiren. 317. Dalt. c. 95. † Hawk. P. C. c. 65.

“ beat, wound, or kill, any of the opponents or
 “ insurgents, who shall resist them* ;” all which
 opinions are supported by solemn decisions, and
 are, in truth, the conclusions of natural reason
 from the simplest and surest premises.

The *fifth* and *sixth* propositions, which I consider as simple corollaries, are founded in part on *extrinsic* assumptions, drawn from history and experience: they may therefore, even by the rules of law, admit of proof from the authority of men, “ quibus in arte suâ credendum est ;” and the following citation from Mr. WINDHAM’s elegant introduction to his *Plan of Discipline for the Norfolk Militia* will be thought as convincing as any passage in Fitzherbert or Brook. “ About the beginning of this century,
 “ says he, the troops in Europe were universally
 “ armed with firelocks; *to which*, much about
 “ the same time, *the bayonet being added*, pikes
 “ also were laid aside. When the use of fire-
 “ arms began to be generally established, the *ne-*
 “ *cessity of a great regularity and uniformity*, in
 “ the manner of using those arms, became appa-
 “ rent: it was soon discovered, that those troops,
 “ which could make the briskest fire, and sustain
 “ it longest, had a great superiority over others
 “ less expert; and, likewise, that *the efficacy and*

* Lamb. Eiren. 318. 1 Hale, H. P. C. 495.

“ power of fire did not consist in random and scat-
 “ tering shots made without order, but in the fire
 “ of a body of men at once, and that properly timed
 “ and directed. It was therefore necessary to ex-
 “ ercise the troops in loading quick, and firing to-
 “ gether by the word of command ; but, as the
 “ awkwardness, carelessness, and rashness, of
 “ young soldiers (if left to themselves) must oc-
 “ casion frequent accidents, and *the loss of many*
 “ *of their own party*, by the unskilful manner of
 “ using their fire-arms, especially in the hurry of
 “ an engagement, it became a matter of *indispen-*
 “ *sable necessity* to teach soldiers an *uniform me-*
 “ *thod* of performing every action that was to be
 “ done with the musket, that they might all do
 “ it in *the most expeditious and safest manner.*”

Should any doubt be raised as to the legality
 of *assembling* for this purpose, and should the
 words of Sir *Matthew Hale*, whom of all men
 I respect the most, be opposed to me, that,
 “ where people are assembled in great numbers
 “ armed with weapons offensive, or weapons of
 “ war, if they march thus armed in a body, if
 “ they have chosen commanders or officers, if
 “ they march *cum vexillis explicatis* or with
 “ drums or trumpets, and the like, it may be
 “ considerable, whether the greatness of their
 “ numbers, and their continuance together doing
 “ these acts, may not amount to *more guerrino*

“*arraiati*, or a levying of war*,” which may be construed an encroachment on the prerogative of the crown†; the answer is no less obvious than decisive, in the language of BRACTON, that, *Voluntas et propositum distinguunt maleficia*‡; that, the intent being good, the act cannot be bad; and that *Bedingfield’s* case is an express authority for the legality of “marching armed in a body” *more guerrino arraiati*, even for the purpose of executing a civil process, to which there is just expectation of violent resistance. So necessary, indeed, is *order* and *discipline* in directing the exertions of an armed assembly, that the statutes 3 and 4 Edw. VI. c. 5. and 1 Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) expressly authorize the sheriffs, justices, mayors, and bailiffs, “to raise power and array them in manner of war” “against the rioters:” and here I may again apply those sound maxims, to which I before alluded: 1. That *the law requires no impossible things*; but it is impossible to join the power and suppress a riot effectually, without being at least moderately skilled in the use of fire-arms, and ready in the common evolutions. 2. That, *when the law permits or enjoins the performance of any act, all the means of performing it are also*

* 1 H. P. C. 131.

† 3 Inst. 9.

‡ L. 3 c. 14 § 13.

permitted or enjoined; but the law doth permit and command *every subject of this realm* to arm himself and use his arms with effect for the suppression of tumults: the conclusion, in both forms of reasoning, follows too closely and too evidently to admit of a doubt.

That the four cases, on which I have relied, have never been shaken by any later decision, appears from the uniform recognition of their authority by the best modern writers: indeed, nothing less than an act of the legislature could justly over-rule unanimous and well-considered resolutions; but no act whatever has in any degree affected them; and the common law, which in general is the perfection of human wisdom, happily in this instance has stood like a rock amid the conflict of statutes rolling upon statutes.

Neither of the statutes of Westminster had any effect on the decision in *Bedingfield's* case; nor was that of *St. John* at all influenced by the subsequent prohibition of hand-guns; nor the *Case of Arms* by the statute of *Northampton*; and though the act of queen *Mary* was continued during the life of *Elizabeth*, yet Sir *Matthew Hale* observes, that, "the case of *Drayton* " *Basset* was not within that statute, nor depending on it*." In the same manner serjeant

* 1 H. P. C. 495.

Hawkins remarks, in conformity to *Hale* and to reason, which will very seldom be found at variance, “that the stat. 1. Geo. I. c. 5. commonly “called the riot-act, being wholly in the affirmative, cannot be thought to take away any part “of the *authority* in the suppressing of a riot, “which was before that time given either to “officers, or *private persons*, by the common law “or by statute*.”

Having shown the nature and extent of the *Posse Comitatum*, and proved that it is required by law to be equal in its exertion to a well-disciplined army, I have established the proposition, which I undertook to demonstrate†: “That the “common and statute laws of the realm, in force “at this day, give the *civil* state in every county “a power, which, if it were perfectly understood “and continually prepared, would effectually “quell any riot or insurrection, without assistance from the *military*, and even without the “modern riot-act.”

One side, therefore, of the distressing alternative, to which I was reduced, concerning the *precariousness* of *English Freedom*‡, is happily removed; but the other side remains, “that our “laws have been disgracefully neglected, and “ought to be restored to full vigour and “energy.”

* 1 P. C. c. 65.

† P. 466.

‡ P. 464.

To what fatal cause must we ascribe a neglect so shameful and so dangerous? I answer boldly, yet, I hope, without arrogance, since I use the very words of BLACKSTONE, “to the vast acquisition of force arising from the riot-act and “the annual expedience of a standing army*,” which has induced a disposition, cherished by the indolence natural to man, and promoted by the excessive voluptuousness of the age, to look up solely for protection to the executive power and the soldiery; a disposition, which must instantly be shaken off, if any spark of virtue remain in our bosoms; for, although we are happy in a prince, who “will never harbour a thought or “adopt a persuasion in any the remotest degree “detrimental to the liberty of *Britain*†,” yet in free states a military power must ever be an object of jealousy; and, since our excellent constitution will be claimed by our posterity as their best inheritance, we must act with a provident care, lest, two centuries hence, the fable of the horse should be verified in our descendants, who may be in need of protection against their protectors, and be forced to carry *barnefs*, notwithstanding the repeal of the statute of *Winchester*.

For the history of the riot-act, so laboured and

* 4 Comm. 434.

† 1 Bl. Comm. 337.

so ineffectual, I must refer my reader to the incomparable author, whom I so frequently cite, the commentator on the laws of *England*; who expresses his jealousy and disapprobation of it with no less delicacy than wisdom*: in respect to the number of capital felonies created by it, which *Blackstone* seems highly to have disapproved, I shall say nothing, as it is not my present subject; but I may, with all due reverence for the legislature in the first year of *GEORGE* the First, observe, that the act was a bad copy of a bad model, the statute of *Mary*; that there seems to have been no occasion to make it perpetual, much less to enlarge it; that it is in some parts liable to dangerous misinterpretation; that it has been found wholly inadequate to the end proposed by it; and that the third clause of it was in great measure unnecessary, as it only affirms “our ancient law, which had pretty well guarded against any violent breach of the peace†.” Confirmatory statutes are always attended with the danger of superseding the use, and obliterating the remembrance, of the common law, which they confirm, and which the wisdom of ages had before sufficiently established.

As to the best mode of *restoring our laws to their full vigour and energy*, and of providing for

* 4 Comm. 143.

† 4 Bl. Comm. 147.

our future defence, I shall certainly submit it to the discretion of my countrymen who are bound by those laws; and shall only suggest to them the following plan; after premising, in the words of serjeant *Hawkins*, “ that, although
 “ *private persons may arm themselves* in order to
 “ suppress a riot, and may consequently *use arms*
 “ in the suppressing of it, if there be a necessity
 “ for their so doing; yet it seems to be extremely
 “ hazardous for private persons to proceed to
 “ those extremities in *common* cases, lest, under
 “ the pretence of keeping the peace, they cause a
 “ more enormous breach of it; and, therefore,
 “ such violent methods seem only *proper* against
 “ SUCH RIOTS AS SAVOUR OF REBELLION, for
 “ the suppressing of which no remedies can be
 “ too severe*.”

THE PLAN.

I.

Let all such persons in every county of ENGLAND as are included in the *power* of that county, and *are of ability to provide themselves with arms*, and pay for learning the use of them, be furnished each with his *musket* and *bayonet*, and their necessary appendages.

* 1 Hawk. P. C. c. 65.

II.

Let several *companies* be formed, in every county, of sixty such men or more, voluntarily associated for the sole purpose of joining the power, when legally summoned, and, with that view, of learning the proper use of their weapons, street-firing, and the various evolutions necessary in action.

III.

Let the companies be taught, in the most private and orderly manner, for two or three hours early every morning, until they are competently skilled in the use of their arms: let them not, unnecessarily, march through streets or high-roads, nor make any the least *military* parade, but consider themselves entirely as part of the *civil* state.

IV.

Let each member of a company, when he has learned the use of his arms, keep them for the defence of his house and person, and be *ready* to join his company in using them for the suppression of riots, whenever the sheriff, under-sheriff, or peace officer shall raise the power, or there shall be *a cry made for weapons to keep the peace*.

V.

Let the *caution*, prefixed to this plan, be di-

ligerly observed, and the law, contained in the preceding citations, be held ever sacred: nor let any *private* person presume to raise the power of the county*, which is the province of the sheriff, under-sheriff or magistrate; although *a cry for weapons to keep the peace* may be made in cases of extreme *necessity*, and in them only, by *private persons*.

VI.

If any mark of distinction in dress shall be thought expedient, that the several companies may know each other, in the forcible suppression of a riot, let such a regulation be severally referred, with any other rules that may be necessary, to a committee chosen out of each company.

The great advantages of such associations are so apparent, that I shall forbear at present to expatiate on them; but shall be satisfied with applying to them what PULTON says of the old tilts and jousts, “that the cause, beginning, and “end thereof do tend do the laudable exercise of “true valour and manhood, and to the encouragement and enabling of the actors therein to “defend the realm and the peace thereof†;” and with observing, in the words of the stat. 33.

* 1 Hale, H. P. C. 601.

† De Pace, 25. b.

Hen. VIII. c. 6, that the musket may now be made, what the long bow was formerly, “ the
 “ surety, safeguard, and continual defence, of
 “ this realm of *England*, and an inestimable
 “ dread and terror to the enemies of the same.”

Objections will certainly be raised; for who can propose a measure, however salutary, to which no man will object? I expect them, however, chiefly from those, whose indolence may induce them rather to seek protection from a power able to crush them, than to protect themselves by joining a power provided by free and equal laws; or from those, who, as MILTON says, “ have betaken themselves to state-affairs
 “ with souls so unprincipled in virtue and true
 “ generous breeding, that flattery, and court-
 “ shifts, and tyrannous aphorisms, appear to
 “ them the highest points of wisdom.” To such men it will be sufficient to give this general answer; that, as there is no necessity of applying either to the executive, or to the legislative, power for permission to obey the laws, we are not to debate on vague notions of expedience, groundless jealousies, or imaginary consequences: the sole question is, “ whether the doctrine expounded in these pages *be law* ;” if it be, there is no room for deliberation, since it is a maxim, that *no man must think himself wiser than the law*, which is the gathered wisdom of many ages; and

so favourable is the *common* law of ENGLAND to the rights of our species, which it is unhappily become the fashion to deride and vilify, that, if any man will broach a position in favour of genuine, rational, manly freedom, I will engage to supply him with abundant authorities in support of it.

I persuade myself, that infinite good must result from the general adoption of my plan; and that no possible evil can be mixed with it, as long as the cautions and restrictions before suggested shall be duly observed, and our excellent constitution be kept in its just balance at that nice point, which is equally removed from the pernicious extremes of republican madness, aristocratical pride, and monarchical folly; nor have I any scruple to confess, that, as every soldier in ENGLAND is at the same time a citizen, I wish to see every citizen able at least, for the preservation of publick peace, to act as a soldier: when that shall be the case, the LIBERTY OF BRITAIN will ever be unassailed; for this plain reason—it will be unassailable.

The security, and consequently the happiness, of a free people do not consist in their belief, however firm, that the executive power will not attempt to invade their just rights, but in their consciousness that any such attempt would be wholly ineffectual.

S P E E C H

TO

THE ASSEMBLED INHABITANTS OF

THE COUNTIES OF

MIDDLESEX AND SURRY,

THE CITIES OF

LONDON AND WESTMINSTER,

AND THE BOROUGH OF

SOUTHWARK.

XXVJII MAY, M.DCC.LXXXII.

ADVERTISEMENT.

HAVING been informed, that parts of my Speech on the 28th of May at the London Tavern were thought obscure, yet important, I have endeavoured to recollect what I then took the liberty to say, and have consented to let the argument go abroad in its rude and unpolished state. What offence this publication may give, either in parts or in the whole, is the last and least of my cares: my first and greatest is, to speak on all occasions what I conceive to be just and true.

A
S P E E C H

ON

THE REFORMATION OF PARLIAMENT.

MY LORD MAYOR,

SO far am I from rising to intimate the slightest shade of dissent from this respectable and unanimous assembly, or the minutest disapprobation of the two resolutions proposed, that I despair of finding words sufficiently strong to express my joy and triumph at the perfect harmony, with which the first of them has already passed, and to which the second will, I trust, be thought equally entitled: but, on the last reading of the proposition now before you, it struck me, that, although it was in *substance* unexceptionable, yet it might easily be improved in *form* by the insertion of two or three words referring to the preceding resolution, and thus be rendered more conducive to our great object of generally declaring our concurrent sense, and avoiding any chance of disunion upon specifick points. Every

proposition, intended to meet with universal concurrence, ought to have three distinguishing properties; it should be just, simple, comprehensive: without justice, it will be rejected by the wise and good; without simplicity, it will involve complex matter, on which the wisest and the best may naturally differ; and without comprehensiveness, it will never answer any purpose of consequence and extent. The first resolution, "that petitions ought to be prepared for a more complete representation of the people," has all of these properties in an eminent degree: it is so just, that, if this meeting had been ten times as large, there would not have been one dissentient voice on that ground; so simple, that it affords no scope or subject for cavil; so comprehensive, that, when the house of commons have the petitions before them, it will give room for every particular plan, which the ingenuity of any member, duly tempered by wisdom, yet actuated by true patriotism, can suggest.

Ought not the *second* proposition, "that the *sense of the people* should be taken this summer in order to prepare their *several* petitions," to be somewhat restrained in the generality of the expression? It is just, but rather *too* comprehensive: *the sense of the people* is a phrase of measureless compass, and may include their several opinions, however specifick, however dif-

cordant. This is the very evil, which we are anxious to prevent; since we all agree, that no particular mode of reformation should be prescribed to the house, lest they should reject, for no other reason, some good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the sentence be thus corrected, "that the sense of the people should "be taken *on the preceding resolution?*" But this I offer as a mere suggestion to wiser heads, and will not trouble the assembly by shaping it into a motion: indeed, if both resolutions be taken together, and it be understood, that we mean to recommend petitions on the *general* ground, in order to shun that fatal rock, *diversity of sentiment on particulars*, I desire no more, and am very little solicitous about accuracy of expression; hoping at the same time, although the *five* circles here assembled have no right or pretension to take the lead in the nation, yet that the other counties, districts, and towns in *Great Britain* will approve our idea, and not disdain to follow our example: in that event I smile at the thought of a miscarriage, and am confident, that, with concurrence, perseverance, and moderation, the people of *England* must prevail in a claim so essential to their liberty, and to the permanence of an administration, who profess to govern with their confidence.

Here I should regularly cease; especially, as I now labour under the pressure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is respectable: it could not prevent my attendance, for, in health or in sickness, I am devoted to your service; and I shall never forget the words of an old *Roman*, *LIGARIUS*; who, when the liberties of his country were in imminent danger, and when a real friend to those liberties was condoling with him on his illness at so critical a time, raised himself on his couch, seized the hand of his friend, and said, *If you have any business worthy of yourselves, I am well.*

It was not in truth my design to have spoken at all this evening; but, since I have risen to explain a sudden thought, I will avail myself of your favourable attention, and hazard a few words upon the *general* question itself: on the smallest intimation of your wishes, I will be silent. Numbers will have patience to hear, who have not time to read; besides, that it is always easier to speak than to write; and, as to myself, a very particular and urgent occasion, which calls me for some months from *England*, will deprive me of another opportunity to communicate my sentiments in either form, until the momentous object before us shall be made certainly attainable through the concord, or for ever lost.

and irrecoverable through the disagreement, of the nation.

The only *specious* argument, that I have anywhere heard, against a change in the parliamentary representation of the people, is, that, "a *constitution*, which has stood for ages, ought "not to be altered."

This objection appears on a superficial view so plausible, and applies itself so winningly to the hearts of *Englishmen*, who have an honest prejudice for their established system, without having in general very distinct ideas of it, that a detection of the *sophism*, for such I engage to prove it, becomes absolutely necessary for the promotion of your glorious enterprise.

I will risk your impatience; for, though I am aware, that allusions to history and interpretations of old statutes are not very proper in addresses to popular assemblies; yet, when popular assemblies take upon them, as they justly may, to act and resolve upon constitutional points, they are bound to seek or to receive information, lest their actions should be rash and their resolutions ill-founded. A power exerted through passion or caprice, without a deep knowledge of the business in hand, and a fair application of the intellectual faculties, is a *tyrannical* power, whether it be regal, aristocratical, or popular; and the prevalence of any such power, by the overbearing

strength of king, nobles, or *people*, would form an immediate *tyranny*, and in a moment subvert the constitution.

That constitution, which, I persuade myself, will not be subverted, consists of form and spirit, of body (if I may so express myself), and of soul: but, in a course of years, the form is apt to deviate so widely from the spirit, that it becomes expedient almost every century to restore its genuine purity and loveliness. The objection, which I undertake to remove, is sophistical, either by design or through ignorance; for the proposition is true in one sense of the word *constitution*, and false in the other; and the sense, in which it is true, is inapplicable to the question. It is true, that the *spirit* of the constitution ought not to be changed: it is false, that the *form* ought not to be corrected; and I will now demonstrate, “that the spirit of our constitution requires a representation of the people, nearly equal and nearly universal.” Such as cannot or will not follow me in the premises, both can and will (or I greatly deceive myself) bear away the conclusion in their memory; and it is of higher importance than they may imagine.

There has been a continued war in the constitution of *England* between two jarring principles; the evil principle of the feudal system with his dark auxiliaries, ignorance and false philoso-

phy; and the good principle of increasing commerce, with her liberal allies, true learning and sound reason. The first is the poisoned source of all the abominations, which history too faithfully records: it has blemished and polluted, wherever it has touched, the fair form of our constitution, and for ages even contaminated the spirit. While any dregs of this baneful system remain, you cannot justly boast of general freedom: it was a system of niggardly and partial freedom, enjoyed by great barons only and many accredited men, who were perpetually insulting and giving check to the king, while they racked and harrowed the people. Narrow and base as it was, and confined exclusively to landed property, it admitted the *lowest freeholders* to the due enjoyment of that inestimable right, without which it is a banter to call a man *free*; the right of voting in the choice of deputies to assist in making those laws, which may affect not his property only, but his life, and, what is dearer, his liberty; and which are not laws, but tyrannous ordinances, if imposed on him without his suffrage given in person or by deputation. This I conceive to have been the right of every freeholder, even by the feudal polity, from the earliest time; and the statute of HENRY IV. I believe to have been merely declaratory: an act which passed in the *seventh* year of that prince, near

four hundred years ago, ordains, that, “*all* they, who are present at the county court, as well suitors *duly summoned* for the same cause, as *others*, shall proceed to the election of their knights for the parliament.” *All suitors*, you see, had the right; and *all freeholders* were *suitors* in the court, however low the value of their freeholds. Observe all along, that one pound in those days was equal to ten at least in the present time. Here then is a plain declaration, that minuteness of *real* property created no harsh suspicion of a dependent mind; for a harsh suspicion it is, and, by proving too much, proves nothing.

What caused the absurd, yet fatal, distinction between property, personal and real? The feudal principle. What created another odious distinction between *free* and *base* holdings, and thus excluded copyholds of any value? The feudal principle. What introduced an order of men, called *villains*, transferable, like cattle, with the land which they stocked? The feudal principle. What excludes the holders of beneficial leases? The feudal principle. What made personality, in those times, of little or no estimation? The feudal principle. What raised the silly notion, that the property, not the person, of the subject, was to be represented? The feudal principle. What prevented the large provision in

the act of *Henry IV.* by which *all freeholders* were declared electors, from being extended to *all* holders of *property*, however denominated, however inconsiderable? The same infernal principle, which then subdued and stifled the genuine equalising spirit of our constitution. Now, if we find that this demon was himself in process of time subdued, as he certainly was by the extension of commerce under *Elizabeth*, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which dispelled the darkness of *Gothick* ignorance, and by the great transactions of the last century, when the true theory and genuine principles of freedom were unfolded and illustrated, we shall not hesitate to pronounce, that, by the *spirit* of our constitution, all *Englishmen*, having property of any kind or quantity, are entitled to votes in chusing parliamentary delegates. The *form* soon received a cruel blemish; for, in the *eighth* of *HENRY VI.* the property of suitors qualified to vote, was restrained to “*forty* shillings a year above all charges,” that is, to twenty pounds at least by the present value of money. I agree with those, who consider this act as basely aristocratical, as a wicked invasion of clear popular rights, and therefore in a high degree unconstitutional: it is also a disgraceful confession of legislative weakness; for the evil,

pretended to be remedied by it, was, that the county elections were *tumultuary*. What! could not the wisdom of the legislature suggest a mode of preventing tumult, if the laws already subsisting had been insufficient for that purpose, without shaking the obligation of all future laws, by narrowing the circle of those, who, being affected by them, ought by natural equity to assist in framing them? Ridiculous and indefensible!

In the *twelfth* of CHARLES II. the mighty fabric of the feudal system was shaken from its basis; but, though its ramparts were overset, its connexions and covered ways destroyed, and its very foundations convulsed, yet the ruins of it have been found replete with mischief, and the mischief operates, even while I speak.

At the Revolution, indeed, the good spirit of the constitution was called forth, and its fair principles expanded: it is only since that auspicious event, that, although we may laugh, when lawyers call their vast assemblage of sense and subtilty *the perfection of human wisdom*, yet we shall deride no man, who asserts the constitution of *England* to be in theory the most perfect of human systems—in theory, not in practice; for, although you are clearly entitled to all the advantages, which the *principles* of the constitution give you, while you claim those advantages by

cool and decent petition, yet, either from some unaccountable narrowness in the managers of the Revolution, or from the novelty and difficulty of their situation, they left their noble work so unfinished, and the feudal poison so little exterminated, that, to use the words of your favourite poet, “ they scotched the snake, not killed it.” Who could have imagined, that, in the *eighteenth* of GEORGE II. the statute of *Henry VI.* would have been adopted and almost transcribed? Who could have dreamed, that, in the *thirty-first* of the same king, the last act would have been recited and approved, with a declaration added, that no tenant by copy of court roll should vote at an election for knights of the shire under penalty of fifty pounds? It was the accursed feudal principle, which suggested these laws, when the fairest opportunity presented itself, of renovating the constitution. Another gale has now sprung up; and, unless you catch it while it blows, it will be gone for ever.

I have proved, unless I delude myself, “ that the “ spirit of our constitution requires a representation “ of the people nearly equal and nearly universal.” Carry this proposition home with you, and keep it as an answer to those, who exclaim “ that “ the constitution ought not to be changed.” I said *nearly* universal; for I admit, that our constitution, both in form and spirit, requires *some* pro-

perty in electors, either real or personal, in possession or in action ; but I consider a *fair trade or profession as valuable property*, and an *Englishman*, who can support himself by honest industry, though in a low station, has often a more independent mind than the prodigal owner of a large encumbered estate. When *Prynne* speaks of *every inhabitant and commoner*, to whom he supposes that the right of voting originally belonged, I cannot persuade myself, that he meant to include such as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were supported by alms.

If modern authorities be demanded in aid of my opinions, I shall only mention the great judge, Sir *William Blackstone*, and I mention him the more willingly, because he never professed democratical sentiments, and, though we admire him as the systematical arranger of our laws, yet we may fairly doubt the popularity of his political notions : nevertheless, he openly allows in his Commentary, “ that the spirit of our constitution is in favour of a more complete representation of the people.” This too is allowed by the very man, who, in another tract, intimates an opinion, “ that the value of freeholds themselves should be greatly advanced above what is now required by law to give the proprietor a voice in county elections.” I told you, that

all reasoning from the statute of *Henry VI.* proved too much, and, consequently, nothing; for, who now would bear the idea of disqualifying those electors of *Surry* and *Middlesex*, whose freeholds were not of the annual value of twenty pounds?

I hear a murmur among you, and perceive other marks of impatience. Indulge me a moment, and I will descend; but let me not be misapprehended. I do not propose to conclude with a specifick motion: it is my deliberate opinion, confirmed by my observations on the event of your associations *to reduce the influence of the Crown*, that your petitions and resolutions must be *very general*. In my own mind I go along with you to the full length of your wishes. If the present system of representation be justly compared to a tree rotten at the heart, I wish to see removed every particle of its rottenness, that a microscopick eye could discern. I deride many of the fashionable doctrines: that of *virtual* representation I hold to be *actual* folly; as childish, as if they were to talk of *negative* representation, and to contend, that it involved any *positive* idea. Substitute the word *delegation* or *deputation*, instead of representation, and you will instantly see the absurdity of the conceit. Does a man, who is *virtually*, not *actually*, re-

presented, delegate or depute any person to make those laws, which may affect his property, his freedom, and his life? None; for he has no suffrage. How then is he represented according to the principles of our constitution? As well might a *Roman* tyrant have urged, that all his vassals were represented in his person: he was augur and high priest; the religious state was, therefore, represented by him: he was tribune of the people; the popular part of the nation were, therefore, represented: he was consul, dictator, master of the horse, every thing he pleased; the civil and military states were, therefore, concentrated in him; the next deduction would have been, that the slaves of his empire were free men. There is no end of absurdities deducible from so idle a play upon words.

That there may be an end of my address to you, which has been too long for the place and occasion, but too short for the subject, I resume my seat with a full conviction, that, if united, and dependent on Yourselves alone, you must succeed; if disunited, or too confident in others, you must fail. Be persuaded also, that the people of *England* can only expect to be the happiest and most.

glorious, while they are the freest, and can only become the freest, when they shall be the most virtuous, and most enlightened, of nations.

TO * * * *

London, May 14, 1782.

SIR,

I TAKE the liberty of submitting to your serious attention the *Plan of National Defence* lately suggested by government, compared with a *different* plan now approved, though subject to revision, by a *Company of Loyal Englishmen*, of which I have the honour to be One. You will instantly see, that the *first* plan was nobly conceived by some great mind, and intended for the noblest purposes; but that, in the *detail*, it appears to be *innovating*, harsh, unconstitutional, and big with alarming consequences; too *expensive* for the treasury, who have no treasures to lavish, and too *distrustful* of a generous and spirited people, who would *vigorously support* a government that *sincerely confided* in them. The *second* plan you will find (and we pledge our honours to prove) *already sanctioned*, and even *required*, by Law, agreeable to the Constitution, and calculated to preserve it; not too expensive to *real* patriots, who will hardly be niggards at such a moment as this; and not at all dangerous to so wise and just a

government as the present. If nothing can raise a manly spirit, and excite a liberal emulation, in *English* gentlemen, yeomen, and traders, but the actual descent of *three united armies* on our coasts, they will *then* vainly solicit that protection for their houses and families, which they *now* have in their own hands, on a glorious invitation from the First and Best of Magistrates.

I am, &c.

A VOLUNTEER.

P. S. Give me leave to observe, that the Lords-Lieutenants, as such, have no more to do with this great business than the bench of Bishops.

HEADS OF A PLAN

For raising Corps in several principal Towns in Great Britain, inclosed in a Letter from the EARL of SHELBURNE to the CHIEF MAGISTRATES of several Cities and Towns.

1st. THE principal towns in Great Britain to furnish one or more battalions each, or a certain number of companies each, in proportion to their size and number of inhabitants.

2d. The officers to be appointed from among the gentlemen of the neighbourhood, or the inhabitants of the said towns, either by commission from his Majesty, or from the Lord-Lieutenant of the County, upon the recommendation of the Chief Magistrate of the town in which the Corps are raised.

3d. They are to be possessed of some certain estate in land or money, in proportion to their rank.

4th. An Adjutant or Town-Major in each town to be appointed by his Majesty.

5th. A proper number of Serjeants and Corporals from the army to be appointed for the Corps in each town, in proportion to their numbers.

6th. The said Serjeants and Corporals, as well

as the Adjutant or Town-Major, to be in the Government pay.

7th. The men to exercise frequently, either in battalions, or by companies, on Sundays, and on Holidays, and also after their work is over in the evenings.

8th. Arms, accoutrements, and ammunition, to be furnished at the expence of Government, if required.

9th. Proper magazines, or storehouses, to be chosen or erected in each town, for keeping the said arms, &c.

10th. The arms and accoutrements to be delivered out at times of exercise only, and to be returned into the storehouses as soon as the exercise is finished.

11th. The Adjutant or Town-Major to be always present at exercise, and to see that the men afterwards march regularly, and lodge their arms in the storehouses.

12th. Proper penalties to be inflicted on such as absent themselves from exercises, as also for disobedience of orders, insolence to their officers, and other disorderly behaviour.

13th. The above Corps not to be obliged, on any account, or by any authority whatever, to move from their respective towns, except in times of actual invasion or rebellion.

14th. His Majesty shall then have power to order the said corps to march to any part of Great Britain, as his services may require.

15th. They are, on such occasions, to act either separately, or in conjunction with his Majesty's regular forces, and be under the command of such General officers as his Majesty shall think proper to appoint.

16th. Both officers and men to receive full pay as his Majesty's other regiments of foot from the day of their march, and as long as they shall continue on service out of their towns.

17th. They are to be subject to military discipline, in the same manner as his Majesty's regular forces, during the said time of their being called out, and receiving government pay.

18th. All officers who should be disabled in actual service to be entitled to half-pay, and all non-commissioned officers and private men, disabled, to receive the benefit of Chelsea Hospital.

19th. The widows of officers killed in the service to have a pension for life.

20th. The time of service to be named.

SKETCH OF A PLAN

For raising a Constitutional Force in the Towns, Cities, and Counties of Great Britain; being an Answer, Article by Article, to the Plan annexed.

1st. AGREED, *with this addition*—And other Battalions, or Companies, to be also *voluntarily* formed out of the *Hundreds, Tythings, and Hamlets, of each county*, in proportion to its extent and populoufness.

2d. The *Officers*, and, in some companies, the *men*, to enrol themselves, from among the *Gentry, Yeomanry, and Substantial Householders*, and the Officers to be commissioned respectively by *the High Sberiff, and Chief Magistrate*, of each county and town.

3d. The *ranks* of the Officers to be proportioned to their *contributions* to a fund raised for purposes mentioned in subsequent articles.

4th. An Adjutant or Town-Major in each county or town, to be *elected by the Officers*.

5th. *Agreed*, for the purpose of *drilling* the men, until a certain number of the *volunteers* can be qualified to act as Serjeants and Corporals.

6th. The said Drill-Serjeants and Corporals *from the army to continue* in the pay of government; but the Adjutants and Town-Majors to be paid, *if they desire pay*, out of a *fund* voluntarily raised for that purpose in the several counties and towns.

7th. Agreed.

8th. Arms, Accoutrements, and Ammunition, to be furnished at the expense of *the counties and towns, if required*; or of the *officers*, if they are generously disposed.

9th. The said arms, &c. to be kept by each man, in *his own house*, for his *legal* protection.

10th. Rejected.

11th. The *officers* to take care, after exercise, that the men march regularly, and return home with their arms.

12th. Agreed, *with this addition*—A set of *Laws*, or *Articles*, to be drawn up by the Officers, and *subscribed or openly consented to* by the men, *after a distinct reading and explanation of each article*. “Consensus facit Legem.”

13th. Agreed, the words *counties or* being inserted after the word *respective*.

14th. The *high sheriff* of each *county*, and *chief magistrate* of each *town*, shall then (on due notice to government) have power to order the said corps to march to any part of

Great Britain, as the *publick* service may require.

15th. Agreed, in case of *actual invasion*; but in *riots* the *magistrates* to call out their respective *corps*: and, as to *rebellion*, or *civil war*, (which God avert!) no specifick provisions can be made for so dreadful and improbable an event.

16th. The counties and towns to pay the men *who require it*; but such, as enrol themselves *without* pay, to wear some mark of distinction, and the officers to serve at *their own* expence.

17th. Agreed, in case of *actual invasion* only; but the words. *and receiving government pay*, to be omitted.

18th. Officers disabled in actual service to be rewarded by a *new order* (as a star and ribband, *orange coloured* or mixed), or by an *eulogium proclaimed* and *recorded* by the *sheriffs* of their several *counties*, or the *chief magistrates* of their corporate *towns*; and the men to receive a comfortable subsistence at their own homes, with a fixed *annuity for life* out of the voluntary fund.

19th. The *widows* and *children* of Officers and Men killed in the service *against invaders* to have also *pensions for life*.

20th. The companies called out as above to be discharged *ipso facto*, as soon as the invaders are repelled, or the particular service terminated.

*A Company of LOYAL ENGLISH
GENTLEMEN.*

THE

PRINCIPLES OF GOVERNMENT,

IN

A DIALOGUE

BETWEEN

A GENTLEMAN AND A FARMER.

ADVERTISEMENT.

A SHORT defence hath been thought necessary, against a violent and groundless attack upon the FLINTSHIRE COMMITTEE, for having testified their approbation of the following Dialogue, which hath been publicly branded with the most injurious epithets; and it is conceived, that the sure way, to vindicate this little Tract from so unjust a character, will be as publicly to produce it.—— The friends of the Revolution will instantly see, that it contains no principle, which has not the support of the highest authority, as well as the clearest reason.

If the doctrines which it slightly touches, in a manner suited to the nature of the Dialogue, be “ seditious, treasonable, and diabolical,” Lord Somers was an incendiary, Locke a traitor, and the *Convention-parliament* a pandæmonium; but, if those names are the glory and boast of *England*, and if that convention secured our liberty and happiness, then the doctrines in question are not only *just* and *rational* but *constitutional* and *salutary*; and the reproachful epithets belong wholly to the system of those, who so grossly misapplied them.

THE

PRINCIPLES OF GOVERNMENT.

F. **W**HY should humble men, like me, sign or set marks to petitions of this nature? It is better for us Farmers to mind our husbandry, and leave what we cannot comprehend to the King and Parliament.

G. You can comprehend more than you imagine; and, as a *free member of a free state*, have higher things to mind than you may conceive.

F. If by *free* you mean *out of prison*, I hope to continue so, as long as I can pay my rent to the 'squire's bailiff; but what is meant by a *free state*?

G. Tell me first what is meant by a club in the village, of which I know you to be a member.

F. It is an assembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we con-

tribute equally from our monthly or weekly savings, and out of which any members of the club are to be relieved in sickness or poverty; for the parish officers are so cruel and insolent, that it were better to starve than apply to them for relief.

G. Did they, or the 'squire, or the parson, or all together, compel you to form this society?

F. Oh! no—we could not be compelled; we formed it by our own choice.

G. You did right——But have you not some head or president of your club?

F. The master for each night is chosen by all the company present the week before.

G. Does he make laws to bind you in case of ill temper or misbehaviour?

F. He make laws! He bind us! No; we have all agreed to a set of equal rules, which are signed by every new comer, and were written in a strange hand by young *Spelman*, the lawyer's clerk, whose uncle is a member.

G. What should you do, if any one member were to insist on becoming *perpetual* master, and on altering your rules at his arbitrary will and pleasure?

F. We should expel him.

G. What, if he were to bring a serjeant's guard, when the militia are quartered in your

neighbourhood, and insist upon your obeying him?

F. We should resist, if we could; if not, the society would be broken up.

G. Suppose that, with his serjeant's guard, he were to take the money out of the box or out of your pockets?

F. Would not that be a robbery?

G. I am seeking information from you. How should you act on such an occasion?

F. We should submit, perhaps, at that time; but should afterwards try to apprehend the robbers.

G. What, if you could not apprehend them?

F. We might kill them, I should think; and, if the King would not pardon us, God would.

G. How could you either apprehend them, or, if they resisted, kill them, without a sufficient force in your own hands?

F. Oh! we are all good players at single stick, and each of us has a stout cudgel or quarter-staff in the corner of his room.

G. Suppose that a few of the club were to domineer over the rest, and insist upon making laws for them——

F. We must take the same course; except that it would be easier to restrain one man, than

a number ; but we should be the majority with justice on our side.

G. A word or two on another head. Some of you, I presume, are no great accountants.

F. Few of us understand accounts ; but we trust old *Lilly* the schoolmaster, whom we believe to be an honest man ; and he keeps the key of our box.

G. If your money should in time amount to a large sum, it might not perhaps be safe, to keep it at his house or in any private house.

F. Where else should we keep it ?

G. You might chuse to put it into the funds, or to lend it the 'squire ; who has lost so much lately at *Newmarket*, taking his bond or some of his fields as your security for payment with interest.

F. We must in that case confide in young *Spelman*, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer.

G. What power do you give to *Lilly*, or should you give to *Spelman* in the case supposed ?

F. No power. We should give them both a due allowance for their trouble, and should expect a faithful account of all they had done for us.

G. Honest men may change their nature. What, if both or either of them were to deceive you.

F. We should remove them, put our trust in better men, and try to repair our loss.

G. Did it never occur to you, that every state or nation was only a great *club*?

F. Nothing ever occurred to me on the subject; for I never thought about it.

G. Though you never thought before on the subject, yet you may be able to tell me, why you suppose men to have assembled, and to have formed *nations, communities, or states*, which all mean the same thing.

F. In order, I should imagine, to be as happy as they can, while they live.

G. By *happy* do you mean *merry* only?

F. To be as merry as they can without hurting themselves or their neighbours, but chiefly to secure themselves from danger, and to relieve their wants.

G. Do you believe, that any King or Emperor compelled them so to associate?

F. How could one man compel a multitude? A King or an Emperor, I presume, is not born with a hundred hands.

G. When a prince of the blood shall in any country be so distinguished by nature, I shall then, and

then only, conceive him to be a greater man than you. But might not an army, with a King or General at their head, have compelled them to assemble?

F. Yes; but the army must have been formed by their own choice. One man or a few can never govern many without their consent.

G. Suppose, however, that a multitude of men, assembled in a town or city, were to chuse a King or Governor, might they not give him high power and authority?

F. To be sure; but they would never be so mad, I hope, as to give him a power of making their *laws*.

G. Who else should make them?

F. The *whole* nation or people.

G. What, if they disagreed?

F. The opinion of the *greater number*, as in our village-clubs, must be taken and prevail.

G. What could be done, if the society were so large, that all could not meet in the same place?

F. A greater number must chuse a less.

G. Who should be the chusers?

F. All, who are not *upon the parish*. In our club, if a man asks relief of the overseer, he ceases to be one of us, because he must depend on the overseer.

G. Could not a few men, one in seven for instance, chuse the assembly of law-makers as well as a larger number?

F. As conveniently, perhaps; but I would not suffer any man to chuse another, who was to make laws, by which my money or my life might be taken from me.

G. Have you a *freehold* in any county of forty shillings a year?

F. I have nothing in the world but my cattle, implements of husbandry, and household goods, together with my farm, for which I pay a fixed rent to the 'squire.

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able by my honest labour to support my wife and four children; and, whilst I act honestly, I may defy the laws.

G. Can you be ignorant, that the Parliament, to which members are sent by this county, and by the next market-town, have power to make new laws, by which you and your family may be stripped of your goods, thrown into prison, and even deprived of life?

F. A dreadful power! I never made inquiries, having business of my own, concerning the business of Parliament, but imagined, that the laws had been fixed for many hundred years,

G. The common laws, to which you refer, are equal, just, and humane ; but the King and Parliament may alter them, when they please.

F. The King ought, therefore, to be a good man, and the Parliament to consist of men equally good.

G. The King alone can do no harm ; but who must judge the goodness of Parliament-men ?

F. All those whose property, freedom, and lives may be affected by their laws.

G. Yet ~~fix~~ men in seven, who inhabit this kingdom, have, like you, no votes ; and the petition, which I desired you to sign, has nothing for its object, but the restoration of you all to the right of chusing those law-makers, by whom your money or your lives may be taken from you. Attend, while I read it distinctly.

F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagerness.

G. I applaud you, and trust, that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the consequence, if the King alone were to insist on making laws, or on altering them at his will and pleasure.

F. He too must be expelled.

G. Oh! but think of his standing army and of the militia, which now are his in substance, though ours in form.

F. If he were to employ that force against the nation, they would and ought to resist him, or the state would cease to be a state.

G. What, if the great accountants and great lawyers, the *Lillys* and *Spelmans*, of the nation were to abuse their trust, and cruelly injure, instead of faithfully serving, the publick?

F. We must request the King to remove them, and make trial of others, but none should implicitly be trusted.

G. But what, if a few great lords or wealthy men were to keep the king himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people, and manage the Parliament.

F. We must fight for the King and ourselves.

G. You talk of fighting, as if you were speaking of some rustick engagement at a wake; but your quarter-staffs would avail you little against bayonets.

F. We might easily provide ourselves with better arms.

G. Not so easily; when the moment of resistance came, you would be deprived of all arms; and those who should furnish you with

them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a strong firelock in the corner of his bed-room.

G. That would be legal as well as rational. Are you, my honest friend, provided with a musket?

F. I will contribute no more to the club, and purchase a firelock with my savings.

G. It is not necessary—I have two, and will make you a present of one with complete accoutrements.

F. I accept it thankfully, and will converse with you at your leisure on other subjects of this kind.

G. In the mean while, spend an hour every morning in the next fortnight in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every *morning*; because, if you exercise *too late in the evening*, you may fall into some of the legal snares, which have been spread for you by those gentlemen, who would rather secure game for their table, than liberty for the nation.

F. Some of my neighbours, who have served in the militia, will readily teach me; and, per-

haps, the whole village may be persuaded to procure arms, and learn their exercise.

G. It cannot be expected, that the villagers should purchase arms, but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury.

F. May they turn to some sense of honour and virtue !

G. Farewell, at present; and remember, “ that a free state is only a more numerous and “ more powerful club, and that he only is a free “ man, who is member of such a state.”

F. Good morning, Sir! You have made me wiser and better than I was yesterday; and yet, methinks, I had some knowledge in my own mind of this great subject, and have been a politician all my life without perceiving it.

THE CHARACTER

OF

JOHN LORD ASHBURTON.

THE publick are here presented not with a fine picture, but a faithful portrait, with the character of a memorable and illustrious man, not in the style of panegyrick on a monument, but in the language of sober truth, which friendship itself could not induce the writer to violate.

JOHN DUNNING (a name to which no title could add lustre) possessed professional talents which may truly be called inimitable; for, besides their superlative excellence, they were peculiarly his own; and as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the best words dropped easily from his lips into the best places with a fluency at all times astonishing, and, when he had perfect health, really melodious: his style of speaking consisted of all the turns, oppositions, and figures, which

the old Rhetoricians taught, and which *Cicero* frequently practised, but which the austere and solemn spirit of *Demosthenes* refused to adopt from his first master, and seldom admitted into his orations, political or forensick.

Many at the bar and on the bench thought this a vitiated style; but, though dissatisfied as criticks, yet, to the confusion of all criticism, they were transported as hearers. That faculty, however, in which no mortal ever surpassed him, and which all found irresistible, was his wit. This relieved the weary, calmed the resentful, and animated the drowsy: this drew smiles even from such as were the objects of it; scattered flowers over a desert; and, like sun-beams sparkling on a lake, gave spirit and vivacity to the dullest and least interesting cause. Not that his accomplishments, as an advocate, consisted principally in volubility of speech or liveliness of raillery. He was endued with an intellect, sedate, yet penetrating; clear, yet profound; subtle, yet strong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no less deeply learned in the sublime principles of jurisprudence and the particular laws of his country, than accurately skilled in the minute, but useful, practice of all our different courts. In the nice conduct of a complicated

cause, no particle of evidence could escape his vigilant attention, no shade of argument could elude his comprehensive reason. Perhaps the vivacity of his imagination sometimes prompted him to sport where it would have been wiser to argue; and, perhaps, the exactness of his memory sometimes induced him to answer such remarks as hardly deserved notice, and to enlarge on small circumstances which added little to the weight of his argument: but those only who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one instant, when the least deliberation might lose the tide of action irrecoverably. The people seldom err in appreciating the character of speakers; and those clients who were too late to engage DUNNING on their side, never thought themselves secure of success, while those against whom he was engaged were always apprehensive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her constitution, or publick law; that the regal power was limited, and popular rights ascertained by it; but that the aristocracy had no other power than that which too naturally results from property, and which laws ought rather to weaken than fortify: he was, therefore, an equal supporter of

just prerogative, and of national freedom, weighing both in the noble balance of our recorded constitution. An able and aspiring statesman, who professed the same principles, had the wisdom to solicit, and the merit to obtain, the friendship of this great man; and a connection, planted originally on the firm ground of similarity in political sentiments, ripened into personal affection which nothing but death could have dissolved or impaired. Whether in his ministerial station he might not suffer a few prejudices insensibly to creep on his mind, as the best men have suffered because they were men, may admit of a doubt; but, if even prejudiced, he was never uncandid, and though pertinacious in all his opinions, he had great indulgence for such as differed from him.

His sense of honour was lofty and heroick; his integrity stern and inflexible; and though he had a strong inclination to splendour of life, with a taste for all the elegancies of society, yet no love of dignity, of wealth, or of pleasure, could have tempted him to deviate, in a single instance, from the straight line of truth and honesty. He carried his democratical principles even into social life, where he claimed no more of the conversation than his just share, and was always candidly attentive, when it was his turn to be a hearer. His enmities were strong, yet placable;

but his friendships were eternal; and if his affections ever subdued his judgment, it must have been in cases, where the fame or interest of a friend were nearly concerned. The veneration with which he constantly treated his father, whom his fortunes and reputation had made the happiest of mortals, could be equalled only by the amiable tenderness which he shewed as a parent. He used to speak with wonder and abhorrence of Swift, who was not ashamed to leave a written declaration, "that he could never be fond of children;" and with applause of the caliph, who, on the eve of a decisive battle, which was won by his valour and wisdom, amused himself in his tent with seeing his children ride on his scymitar, and play with his turban, and dismissed a general, as unlikely to treat the army with lenity, who durst reprove him for so natural and innocent a recreation.

For some months before his death, the nursery had been his chief delight, and gave him more pleasure than the cabinet could have afforded: but this parental affection, which had been a source of so much felicity, was probably a cause of his fatal illness. He had lost one son, and expected to lose the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to see him again in a perishable state.—As he perceives,

without affectation, that his tears now steal from him, and begin to moisten the paper on which he writes, he reluctantly leaves a subject, which he could not soon have exhausted; and when he also shall resign his life to the great Giver of it, he desires no other decoration of this humble grave-stone than this honourable truth:

With none to flatter, none to recommend,
DUNNING approv'd and mark'd him as a friend.

END OF THE SIXTH VOLUME.

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